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No. 84-592-ASX
Status: GRANTED

Title: Norman Williams and Susan Levine, Appellants
v.
Vermont, et al.

Docketed:
October 9, 1984

Court: Supreme Court of Vermont

Counsel for appellant: Williams,Norman

Counsel for appellee: Eschen,Andrew M.

Entry	Date	Note	Proceedings and Orders
1	Oct 9 1984	G	Statement as to jurisdiction filed.
2	Oct 26 1984		Waiver of right of appellee Vermont, et al. to respond filed.
3	Nov 7 1984		DISTRIBUTED. November 21, 1984
5	Nov 26 1984		REDISTRIBUTED. November 30, 1984
7	Dec 3 1984		REDISTRIBUTED. December 7, 1984
8	Dec 10 1984		PROBABLE JURISDICTION NOTED.
			**********
9	Jan 24 1985		Brief of appellants Norman Williams, et al. filed.
10	Jan 24 1985		Joint appendix filed.
11	Feb 5 1985		SET FOR ARGUMENT. Tuesday, March 19, 1985. (1st case).
12	Feb 22 1985		Brief of appellees Vermont et al. filed.
13	Feb 23 1985		Record filed.
14	Feb 28 1985		CIRCULATED.
15	Mar 11 1985	X	Reply brief of appellants Norman Williams, et al. filed.
16	Mar 19 1985		ARGUED.

1pp

84-592

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NORMAN WILLIAMS and SUSAN LEVINE,
Appellants,

v.

STATE OF VERMONT and WILLIAM H. CONWAY, JR., COMMISSIONER, VERMONT DEPARTMENT OF MOTOR VEHICLES,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF VERMONT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does a state motor vehicle "use" tax, which facially discriminates on the basis of residency in granting tax credits, violate the Equal Protection or Privileges and Immunities Clause of the United States Constitution?

2. Does the Commerce Clause prohibit a state from imposing a "use" tax on property brought from another state without granting credit for sales tax paid to the state of origin?

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JURISDICTIONAL STATEMENT

Nature of Proceeding

Norman Williams and Susan Levine appeal from the final judgment of the Supreme Court of Vermont dated June 15, 1984, and denial of motion for reargument dated July 9, 1984. The Vermont Supreme Court held that the Vermont Motor Vehicle Purchase and Use Tax, Vt. Stat. Ann. tit. 32, §§8901-8911, is not unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, am. XIV, §1, cl. 4; the Privileges and Immunities Clause of the United States Constitution, Art. IV, §2, cl. 1; or the Commerce Clause of the United States Constitution, Art. I, §8, cl. 3. The Vermont Supreme Court's decision conflicts with the established decisions of this Court.

Opinions Below

The opinion of the Supreme Court of

Vermont, not yet reported, appears at p. 1a of the Appendix hereto. (The opinion upon which the Vermont Supreme Court relied, Leverson v. Conway, Docket No. 83-157 (Vt., June 15, 1984) appears as p. 19a of the Appendix hereto.)

The unreported order of the Vermont Supreme Court denying Appellants' motion for reargument appears at p. 3a of the Appendix hereto.

The unreported opinion of the trial court, the Superior Court of Vermont for Washington County, appears at p. 4a of the Appendix hereto.

Jurisdiction

The Supreme Court of Vermont on June 15, 1984, entered a final judgment affirming the trial court's order dismissing Appellants' complaint under Rule 12, V.R.Civ.P. Appendix at 1a. The Supreme Court of Vermont based its one-line decision in this case on a related and as

yet unreported decision, Leverson v. Conway, Docket No. 83-157 (Vt., June 15, 1984). A copy of that decision is attached. Appendix at 19a. Appellants' motion for reargument was denied on July 9, 1984. Appendix at 3a. Appellants filed a notice of appeal to this Court with the Supreme Court of Vermont on July 25, 1984. Appendix at 46a. This appeal is being docketed in this Court within 90 days from the entry of the order denying reargument of the Supreme Court of Vermont. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

Constitutional and Statutory Provisions Involved

Amendment XIV, §1, cl. 4, United States Constitution:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article IV, §2, cl. 1, United States Constitution:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Article I, §8, cl. 3, United States Constitution:

The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .

Vt. Stat. Ann. tit. 32, §§8901, 8902(2), 8903, 8905(b), 8907, 8909, 8911:

[The text of these statutes may be found at pages 136 through 146 of volume 9, Vt. Stat. Ann., and at pages 3-4 of the 1983 supplement thereto. A copy of the statutes is reprinted at pages 48a - 59a of the Appendix.]

STATEMENT OF THE CASE

On February 1, 1981, Appellant Norman Williams moved to Vermont, where he now lives. He brought with him a 1980 Volkswagen Dasher Diesel, purchased for $9,300

in Chicago Heights, Illinois, on December 10, 1980. At the time of the purchase, he paid a five percent Illinois sales tax, or $465.

Appellant Williams' Illinois registration expired on September 30, 1981. As a Vermont resident under Vt. Stat. Ann. tit. 23, §4(30), he was then required to register his motor vehicle in Vermont by Vt. Stat. Ann. tit. 23, §301.

Appellant Williams presented his completed Registration Tax and Title Application to the Vermont Department of Motor Vehicles on October 22, 1981. He was informed by a clerk for the Vermont Motor Vehicle Department that he would be required to pay a four percent tax on the value of his automobile, despite the fact that he had already paid a five percent sales tax in Illinois. Appellant Williams declined to pay the four percent tax on grounds that it was unconstitutional.

Absent payment, the Department of Motor Vehicles and Appellee William Conway, its Commissioner, refused vehicle registration.

On November 3, 1981, Appellant Williams brought an action in Vermont Federal District Court, seeking a declaratory judgment that Vt. Stat. Ann. tit. 32, §§8903, 8909, and 8911 were unconstitutional. On June 30, 1982, following this Court's decision in California v. Grace Brethren Church, 457 U.S. 393 (1982), that action was dismissed on jurisdictional grounds under the Tax Injunction Act, 28 U.S.C. §1341.

On August 27, 1982, Appellant Williams again presented a completed Registration Tax and Title Application to the Department of Motor Vehicles. Based on a "low book" value for the car of $4,300, the Department assessed and Appellant Williams paid under protest a

four percent tax of $172. After paying the tax, Williams requested a hearing before the Department of Motor Vehicles. In findings of fact and a decision dated October 26, 1982, the hearing officer ruled that the Department could not reach the constitutional questions raised and dismissed the appeal.

Accordingly, Appellant Williams on November 22, 1982, filed a complaint in the Vermont state trial court, the Superior Court for Washington County, Vermont, seeking a refund of the tax paid and a declaratory judgment that Vermont's purchase and use tax scheme for motor vehicles was unconstitutional. Williams claimed that the tax scheme violated his rights under the Equal Protection Clause, Privileges and Immunities Clause, and Commerce Clause of the U.S. Constitution and under the Proportional Contribution Clause of the Vermont Constitution. In

lieu of answering the complaint, Appellees on December 23, 1982, moved to dismiss under Rule 12, V.R.Civ.P.

On January 23, 1983, before any judgment in the case was rendered, Appellant Susan Levine moved to intervene in Williams v. Vermont as a party-plaintiff, and an amended complaint stating the claims of both Appellants was filed. Miss Levine had moved to South Burlington, Vermont, from Saranac Lake, New York, in November, 1979. She brought with her a 1979 Chrysler Horizon purchased on September 29, 1978, for $4,923.40 from Upstate Auto Service and Body Works, Inc., in Saranac Lake, New York. At the time of purchase, she had paid a seven percent New York sales tax, or $344.64.

On December 16, 1982, and before expiration of her New York registration, Miss Levine presented a completed Registration Tax and Title Application to the

Vermont Department of Motor Vehicles. Based on a "low book" value of $2,750, the Department of Motor Vehicles assessed, and Appellant Levine paid, a four percent "use" tax to Vermont of $110.

At a meeting in chambers and off-the-record on January 26, 1983, the Vermont Superior Court granted Appellant Levine's motion to intervene. The parties also agreed to waive oral argument and to rely on their briefs with respect to the motion to dismiss.

The Superior Court granted the Appellees' motion to dismiss on February 24, 1983. It held that, although the motor vehicle purchase and use tax did discriminate on the basis of residency, such discrimination was "rationally related" to the cost of maintaining state highways and therefore did not violate the Equal Protection Clause. It applied the same "rational basis" test in concluding

that the statutory scheme did not violate the Privileges and Immunities Clause. Finally, the Superior Court ruled that no "discrimination against interstate commerce" had been "demonstrated" and dismissed Appellants' claim under the Commerce Clause of the U.S. Constitution as well.[1]

Appellants Levine and Williams filed a notice of appeal to the Vermont Supreme Court on March 22, 1983. See Appendix at 46a. Appellants asserted the same four claims for relief before the Vermont Supreme Court: violation of the Equal Protection, Privileges and Immunities, and Commerce Clauses of the U.S. Constitution

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1. The lower court's use of the word "demonstrate" suggests a failure of proof on the part of Appellants. However, proof plainly was not appropriate in the context of a motion to dismiss under Rule 12, V.R.Civ.P.

and violation of the Proportional Contribution Clause of the Vermont Constitution. After submission of memoranda and oral argument, the Vermont Supreme Court rejected Appellants' claims and affirmed the lower court's dismissal. The Appellants moved for reargument on June 27, 1984, based in part on this Court's decision in Armco, Inc. v. Hardesty, 52 U.S.L.W. 4787 (June 12, 1984). That motion was denied without opinion by the Vermont Supreme Court on July 9, 1984. See Appendix 3a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case presents substantial federal questions with respect to a state's right to impose discriminatory taxes on automobile operation based on residency and point of purchase. Briefly put, Vermont imposes a substantial

"purchase and use" tax[2] on individuals seeking to register their automobiles in Vermont. However, Vermont residents only are specifically granted a credit against that tax for automobile sales taxes paid other states.[3] Individuals who were not Vermont residents when they purchased

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2. Under Vt. Stat. Ann. tit. 32, §§8903(b) and 8905(2), the tax imposed is four percent of the purchase price of the automobile or $600, whichever is greater. However, the Vermont Department of Motor Vehicles routinely assesses the four percent tax only on the "low book" value of the car. Appellees' attorney has stated publicly that the challenged portion of the tax yields revenues to Vermont of at least $1 million. See Appendix, p. 61a.

3. Vt. Stat. Ann. tit. 32, §8911(9). Credit is granted to residents under the statute when "the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances." Both of the relevant states in this case, New York and Illinois, do grant reciprocal credit. According to the Department of Motor Vehicles, 35 states grant such credit.

their automobiles are denied such a credit. The resultant resident--non-resident discrimination violates the Equal Protection and Privileges and Immunities Clauses of the U.S. Constitution. Further, Vermont's failure to grant a credit against its "purchase and use" tax for all sales taxes paid other states, regardless of whether residents or non-residents paid them, violates the Commerce Clause of the U.S. Constitution.

I. THE IMPOSITION OF A DISCRIMINATORY TAX BASED ON STATE RESIDENCY PRESENTS SUBSTANTIAL FEDERAL QUESTIONS.

A. Vermont's Motor Vehicle "Purchase and Use" Tax Conflicts With Established Decisions of This Court Under the Equal Protection Clause.

The first question presented by this case is whether Vermont's motor vehicle tax scheme violates the Equal Protection or Privileges and Immunities Clause of the U.S. Constitution. As interpreted by this Court, the Equal Protection Clause forbids

any tax which discriminates between new and long-term residents or interferes with an individual's "right to travel,"[4] unless that tax serves a "compelling" state interest. Vermont's motor vehicle tax discriminates by granting a tax credit only to those persons who were Vermont residents when they purchased their automobiles in other states. Because it "operates to penalize those persons, and only those persons, who have exercised their constitutional right to interstate migration," it interferes with Appellants'

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4. This Court suggested in Zobel v. Williams, 457 U.S. 55 (1982) that the "right to travel" may be better thought of as a particular application of the equal protection analysis. Id., n. 6 at 50 (main opinion). Other members of the Court believed that the "right to travel" remained distinct. See id., at 71 (O'Connor, Jr., concurring). Under either view, Vermont's motor vehicle tax fails to pass constitutional muster.

"right to travel." Oregon v. Mitchell, 400 U.S. 112 at 238 (1970) (separate opinion of Brennan, White and Marshall, JJ.). Defendants have not suggested any "compelling" state interest to justify such discrimination and interference.

The Vermont Supreme Court in Leverson v. Conway, Docket No. 83-157 (June 15, 1984) (upon which it relied in affirming the dismissal of this case), held that the fundamental "right to travel" was not violated nor even implicated by the Vermont motor vehicle tax. Appendix, p. 29a. It said:

> "He [the appellant] was free to bring his property, including his station wagon, to Vermont without incurring any penalty as a result."

Appendix 29a. The Vermont Supreme Court based this holding on the fact that no tax was actually due until the Appellant "sought the privilege of operating that vehicle on Vermont's highways." Id.

With this transparent sleight-of-hand, the Vermont Supreme Court sought to avoid entirely the Equal Protection Clause. Despite the Court's reasoning, however, the fact remains that Vermont does impose a substantial penalty on individuals immigrating to Vermont which it does not impose on individuals already there. The fact that the tax is imposed on the immigrant when he seeks to operate his automobile, rather than when he transports it into the state, is irrelevant to the Equal Protection analysis. It is the discrimination itself and not its timing that offends the Equal Protection Clause. As this Court said in Zobel v. Williams, the Clause "protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents." 457 U.S. 55 at

60, n. 6. See also Memorial Hospital v. Maricopa County, 415 U.S. 250, 263 (1974).

B. Vermont's Motor and Vehicle "Purchase and Use" Tax Cannot Be Squared With This Court's Decisions Under The Privileges and Immunities Clause.

The Privileges and Immunities Clause,[5] while related to the Equal Protection Clause, demands a separate and distinct analysis. The court must first look to whether the individual right affected bears "upon the vitality of the Nation as a single entity," Baldwin v. Montana Fish and Game Commission, 436 U.S. 371, 383, or is required for a "norm of comity," Austin v. New Hampshire, 420 U.S. 656, 660 (1975). If so, the challenged

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5. Differences, if any, in the effect of the two Privileges and Immunities clauses in the United States Constitution, one in Article IV, §2, and the other in Section 1 of the Fourteenth Amendment, have not been settled. Baldwin v. Montana Fish and Game Commission, 436 U.S. 371, 380 (1978).

statute may not stand unless the non-residents "constitute a peculiar source of the evil at which the statute is aimed" and there is a "substantial relationship between that evil and the statutory discrimination against non-residents." Hicklin v. Orbeck, 437 U.S. 518, 525-527 (1978).

Under Baldwin, any interference with an individual's "right to travel" does "bear upon the vitality of the Nation as a whole." Moreover, Vermont's motor vehicle tax also burdens Appellants' right to equal taxation and to pursuit of a livelihood, both of which have been protected by this Court under the Privileges and Immunities Clause. See, e.g., Austin, 420 U.S. at 662, 663; Toomer v. Witsell, 334 U.S. 385 (1948).

Vermont's motor vehicle tax cannot be saved under Hicklin on grounds that non-residents constitute a "peculiar

source" of the evil at which the tax statute is aimed. Assuming the tax is aimed at maintaining Vermont's highway system, Appellees in this case have not and could not argue that the use of Vermont highways by non-residents who move to the state is a unique or even very significant cause of road deterioration. Use of roads by trucks, recreational vehicles, and resident cars surely causes far more wear and tear than use by non-residents who take up residence in Vermont. As is made clear in Hicklin, the fact that non-residents may be one of many sources of the problem does not justify discriminatory treatment against them. 437 U.S. at 526, 527.

The Vermont Supreme Court also held that the Vermont motor vehicle tax does not infringe Appellants' rights under the Privileges and Immunities Clause, since (in the Vermont Supreme Court's view) no

"fundamental rights" are infringed. Appendix, p. (10, 11). This analysis is plainly wrong under Austin and Baldwin. Those cases direct the court's attention to "norms of comity" or "rights which bear upon the vitality of the Nation as a single entity," not "fundamental rights." Certainly, this Court has struck down many statutes under the Privileges and Immunities Clause which do not involve fundamental rights in the equal protection clause sense. See e.g., Ward v. Maryland, 12 Wall. (U.S.) 418 (1817) (statute charging non-residents $300 annually to trade in goods not manufactured in Maryland while residents paid maximum of $150); Toomer (non-resident commercial shrimp fishermen charged higher fee than residents). This Court should consider Appellants' claim under the proper Privileges and Immunities Clause analysis.

II. VERMONT'S FAILURE TO GRANT A TAX CREDIT TO ALL INDIVIDUALS FOR SALES TAXES PAID OTHER STATES RAISES A SUBSTANTIAL FEDERAL QUESTION UNDER THE COMMERCE CLAUSE.

Appellants also claim that Vermont's motor vehicle tax offends the Commerce Clause of the U.S. Constitution in failing to grant a credit to all persons (not just Vermont residents) for sales tax paid to other states. By failing to grant such a credit, the tax provides an illegal incentive for persons planning to move to Vermont to wait and purchase their car in Vermont.

A. This Court Has Expressly Reserved the Commerce Clause Issue Twice; Individual Justices Have Expressed Opposing Views; the Lower Courts Are Split; and Commentators Disagree.

This Court has never decided whether the Commerce Clause requires a state to credit, against its own use tax, a sales tax paid another state. The Court has, in fact, reserved decision on that point twice. Southern Pacific Co. v. Gallagher,

306 U.S. 167, 172 (1939); Henneford v. Silas Mason Co., 300 U.S. 577, 587 (1937). At least one commentator and one legal reference work have remarked this omission. See L. Tribe, American Constitutional Law (1978) §6-16, at 359 n.24; 68 Am.Jur.2d Sales and Use Taxes §191, at 257.

Individual Justices have expressed contradictory views on the issue. Justice Brennan suggested a view consonant with that of the Vermont Supreme Court in his concurring opinion in Halliburton Oil Well Co. v. Reilly, 373 U.S. 64, 76-77 (1963). In International Harvester Co. v. Department of Treasury, 322 U.S. 340, 349-62 (1944) (Rutledge, J., concurring and dissenting in McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944)), Justice Rutledge, although reserving decision on the instant point, 322 U.S. at 362, expressed the view that cumulative

taxation of an interstate sale by the state of origin and the state of use would be an unconstitutional burden on interstate commerce. 322 U.S. at 359-60.

The lower courts are split. Cf. Montgomery Ward & Co. v. State Board of Equalization, 272 Cal. App.2d 728, 78 Cal. Rptr. 373, 394 (1969) cert. denied, 396 U.S. 1040 (1970) (invalidating provision of California use tax that failed to extend credit for sales tax paid other states) with J. C. Penney & Co., Inc. v. Hardesty, 264 S.E.2d 604 (W.Va. 1980) (holding that consumers lack standing to invoke the Commerce Clause to challenge use tax which failed to extend credit for sales tax paid other states).

Commentators likewise disagree. Most have adopted views inconsistent with that of the court below. See Comment, Compensating Use Taxes, 18 Ark. L. Rev. 321, 338-39 (1964-65) (suggesting that an

offsetting credit is a "proper mechanism to keep interstate trade unfettered by provincialisms manifested in taxing statutes," id. at 339); Note, Economic Neutrality and the Compensatory Use Tax, 16 Stan. L. Rev. 1016, 1028 (1964) ("a credit provision in some form is more consistent with the desire of the drafters of the commerce clause to destroy state economic boundaries than is the suggestion in Henneford that each state be viewed as a self-contained unit") (footnote omitted); Note, Developments in the Law -- Federal Limitations on State Taxation of Interstate Business, 75 Harv. L. Rev. 953, 999 (1962) (use tax appears invalid on the ground of double taxation where the buyer takes delivery in a sales tax state other than the one in which the goods will be used); M. Cruz, The Use Tax: Its History, Administration, and Economic Effects (1941) (same); but cf. T. Powell, New

Light on Gross Receipts Taxes, 53 Harv. L. Rev. 909, 930-31 (1940).

B. The Decision of the Court Below Conflicts with Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977).

In Leverson v. Conway, Docket No. 83-157 (June 15, 1984), (the decision on which the Vermont Supreme Court relied in affirming dismissal in the instant case), the court reasoned that because the appellant there and his car were no longer "in transit" but "had come to rest," Appendix, p. 44a, commerce was at an end and the use tax imposed on appellant's car did not implicate the Commerce Clause. Without facing the question of whether a use tax that fails to extend credit for sales tax paid another state discriminates against interstate commerce, the court below stated that property at rest is "clearly an appropriate subject for the imposition of a non-discriminatory use tax." Appendix, p. 44a.

Property which is "at rest," rather than "in transit," certainly may be the subject of a non-discriminatory state tax. Michelin Tire Corp. v. Wages, 423 U.S. 276, 290 & n. 11 (1976). But merely labelling the property "at rest" does not excuse a tax which discriminates against interstate commerce. In Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 332 n. 12 (1977), this Court rejected the notion that a tax should be sustained "because it is imposed on a local event at the end of interstate commerce." The question, the Court held, is not whether commerce is at an end, but whether the tax discriminates "on the basis of some interstate element." Id. See generally, Dayton Power & Light Co. v. Lindley, 58 Ohio St.2d 465, 475, 391 N.E.2d 716, 721-22 (1979).

This Court has made it abundantly clear that the test of the validity of a

state tax under the Commerce Clause is whether, in practical effect, the tax discriminates against interstate commerce. Maryland v. Louisiana, 451 U.S. 725, 756 (1981). Moreover, only three days before the court below issued its decision, this Court held that, in evaluating the effect on interstate commerce of a state tax, the proper analysis is to evaluate the "internal consistency" of the tax: "'that is the [tax] must be such that, if applied by every jurisdiction' there would be not impermissible interference with free trade." Armco Inc. v. Hardesty, 52 U.S.L.W. 4787, 4789 (U.S. June 12, 1984) (No. 83-297) (quoting from Container Corp. of America v. Franchise Tax Board, 103 S.Ct. 2933, 2942 (1983)).[6]

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6. The Vermont Supreme Court specifically rejected Appellants' motion
(Footnote Continued)

A "compensating" use tax that affords no credit for sales tax paid another state is not "internally consistent." If every state in the Union adopted a tax like Vermont's motor vehicle tax, every individual in Appellants' position would be subject to multiple taxation and would face an incentive to buy in the state of destination. Such a tax "overcompensates"; it increases rather than reduces barriers to neutral economic decision making. By contrast, a true compensating use tax, one which affords credit for sales tax paid to the state of origin, eliminates tax considerations in consumer purchases and emphasizes legitimate commercial concerns, including price,

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(Footnote Continued)
for reargument based on Armco. Apparently, consideration of that case would not modify the lower court's opinion.

quality, and time and place of delivery based on the buyer's need.

CONCLUSION

The Vermont Motor Vehicle Purchase and Use Tax is constitutionally flawed in two respects. First, the statute requires new residents to pay a substantial tax before they may operate their own cars, while older residents in identical circumstances are granted a tax credit. Such discrimination is forbidden by the Equal Protection and Privileges and Immunities Clauses of the U.S. Constitution. Nor can it be sanctioned merely because the tax is imposed as a condition of operating the vehicle, rather than bringing it into the state, as the Vermont Supreme Court believes.

Vermont's motor vehicle tax also discriminates against interstate commerce in failing to grant a credit against the use tax for sales tax paid to another

state. The time has come for this Court to mark a limit to a state's taxing power by declaring that a taxpayer paying in a state of origin cannot be compelled to pay again in the state of destination. Accordingly, this Court should note probable jurisdiction.

Dated: Burlington, Vermont
October 8, 1984

Respectfully submitted,

Norman Williams

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[PA1312]

APPENDIX

VERMONT SUPREME COURT

ENTRY ORDER

SUPREME COURT DOCKET NO. 83-139

June Term, 1984

NORMAN WILLIAMS, Esq., and SUSAN LEVINE	)	APPEALED FROM: Washington Superior Court
v.	)	Docket No. S-436-82Wnc
STATE OF VERMONT; WILLIAM H. CONWAY, JR., COMMISSIONER OF MOTOR VEHICLES	)	

Filed June 15, 1984

In the above entitled cause the Clerk will enter:

This case being controlled by our decision in Leverson v. Conway, ___ Vt.

___, ___ A.2d ___, filed this same date, the judgment below is affirmed.

BY THE COURT:

/s/ Franklin S. Billings, Jr.
Chief Justice

/s/ William C. Hill

/s/ Wynn Underwood

/s/ Louis P. Peck

/s/ Ernest W. Gibson III
Associate Justices

VERMONT SUPREME COURT

ENTRY ORDER

SUPREME COURT DOCKET NO. 83-139

June Term, 1984

NORMAN WILLIAMS, Esq., and SUSAN LEVINE	)	APPEALED FROM: Washington Superior Court
v.	)	Docket No. S-436-82Wnc
STATE OF VERMONT; WILLIAM H. CONWAY, JR., COMMISSIONER OF MOTOR VEHICLES	)	

Filed July 9, 1984

In the above entitled cause the Clerk will enter:

Plaintiffs' motion for reargument is denied.

BY THE COURT:

/s/ Franklin S. Billings, Jr.
Chief Justice

/s/ William C. Hill

/s/ Wynn Underwood

/s/ Louis P. Peck

/s/ Ernest W. Gibson III
Associate Justices

STATE OF VERMONT

WASHINGTON COUNTY, SS.

NORMAN WILLIAMS and SUSAN LEVINE	)	
	)	WASHINGTON
v.	)	SUPERIOR COURT
	)	
STATE OF VERMONT and WILLIAM H. CONWAY, JR.	)	DOCKET NO. S436-82WnC

OPINION AND ORDER

The above-entitled cause came before the Washington Superior Court on the Motion to Dismiss filed by Defendants. Plaintiffs seek a declaratory judgment that 32 V.S.A. §8903 and §8911 are unconstitutional and refund of the use tax they have paid.

Plaintiffs purchased their motor vehicles out-of-state prior to the time they became residents of Vermont and paid sales tax to the states where the purchases were made, Williams in Illinois and Levine in New York. Both Plaintiffs

subsequently moved to Vermont and paid, under protest, a Vermont use tax on the present fair market value of their vehicles. In this action, they maintain that the imposition of a use tax without an offsetting credit for the sales tax they paid to another state violates the Privileges and Immunities, the Equal Protection and the Commerce Clauses of the United States Constitution, and the Proportional Contribution Clause of the Vermont Constitution.

32 V.S.A. §8903 imposes a sales tax of 4% of the taxable costs of the vehicle of $600, whichever is less, upon all motor vehicles purchased by residents of Vermont. Subsection (b) of that provision imposes a corollary use tax of the same amount which is triggered by the registration or transfer of registration of a vehicle. A use tax need not be paid if a Vermont sales tax has been paid. In

addition, 32 V.S.A. §8911 provides a further exception to the use tax for:

> (9) pleasure cars acquired outside the state by a resident of Vermont on which a state sales tax or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another state is less than the Vermont tax the tax due shall be the difference.

A similar provision which applied to pleasure cars acquired outside the state by nonresidents was repealed in 1979.

Under this statutory scheme, a Vermont resident who purchases a motor vehicle out-of-state is credited for sales tax paid in the state of purchase when the Vermont use tax is imposed. A nonresident who purchases a car out-of-state and subsequently registers his car in Vermont is not granted such a credit. This distinction, Plaintiffs maintain, violates their constitutional rights.

All states which impose a sales tax also impose a complementing use tax on tangible property acquired outside of the state. This measure is intended to protect sales tax revenues by placing in-state retailers on a competitive parity with out-of-state retailers exempt from the local sales tax. National Geographic v. California Equalization Board, 430 U.S. 551, 555 (1977). The power of the states to establish a nondiscriminatory tax on the use of goods brought from another state has been firmly established. Henneford v. Silas Mason Co., 300 U.S. 577 (1938).

The Washington use tax statute construed by the Court in Henneford provided an offsetting credit available to residents and nonresidents alike if any tax had been paid to another state by reason of use or purchase there. Id. at 584. The Court cautioned, however, that

> [we] have not meant to imply by anything said in this opinion that allowance of a credit for other taxes paid to Washington made it mandatory that there should be a like allowance for taxes paid to other states. A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere. If there are limits to that power, there is no need to mark them now. It will be time enough to mark them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination.

Id. at 587. And, in a later decision, the Supreme Court declined to rule on the constitutional necessity of an offset in the absence of evidence that the taxpayer had paid a sales tax in the state of origin. Southern Pacific Co. v. Gallagher, 305 U.S. 167 (1939).

The practice of granting a credit for sales tax has been adopted by a majority of the states which impose a use tax on out-of-state purchases. 68 Am.Jur.2d Sales and Use Taxes §220. Vermont, like most, provides for such a credit for

purchases by residents. The sole issue before the Court, therefore, is whether the legislature's failure to provide a similar credit for nonresidents constitutes discrimination of constitutional dimensions.

The mandate of Halliburton Oil Well Cementing Co. v. Reilly, 373 U.S. 64, 70 (1963), is that "equal treatment for in-state and out-of-state taxpayers similarly situated is a condition precedent for a valid use tax on goods imported from out-of-state." Equality of treatment refers to what happens within the taxing state, and not to the entire tax burden imposed on a particular taxpayer.

If a difference in treatment exists, the Court must impose "only the minimum scrutiny of the so-called 'rational basis test'." Hadwen, Inc. v. Dept. of Taxes, 139 Vt. 37, 42, 422 A.2d 255 (1980).

Classification is unconstitutional only when similar people are treated differently for wholly arbitrary and capricious reasons. Id. Where the classification rests on "some reasonable consideration of legislative policy, it is not unconstitutional." Andrews v. Lathrop, 132 Vt. 256, 259, 315 A.2d 860 (1974).

> [The] equal protection [clause] does not require identity of treatment with respect to classification for tax purposes, but only that the classification or distinction rest on a real, unfeigned difference; have some relevance to the legislative purpose; and lead to a difference in treatment which is not so disparate as to be wholly arbitrary.

Vermont Motor Inns, Inc. v. Town of Hartford, 134 Vt. 52, 55, 350 A.2d 369 (1975).

We are persuaded that 32 V.S.A. §8911 does not afford, on its face, equal treatment to residents and nonresidents who purchase cars out-of-state. We

conclude, however, that this disparity is supported by a rational purpose and is reasonably structured to advance a legitimate legislative goal.

We take as a logical starting point the premise that Vermont has the right to impose a sales or use tax on all motor vehicles purchased or used within the state. In fact, however, neither Vermont, New York or Illinois imposes a sales tax on vehicles sold to nonresidents. To that extent, the reciprocal credit provision of 32 V.S.A. §8911 is inapplicable, since a Vermont resident buying a car in New York or Illinois would not have paid a sales tax, and would thus be liable for the entire amount of use tax in Vermont.

Vermont taxes only sales made to Vermont residents, whether in the guise of a sales tax (if purchased in-state) or a use tax (if purchased out-of-state). Whatever the tax is called, it is imposed

only once - by the state of consumption. When a motor vehicle is used in more than one state, however, it is reasonable to subject it to a use tax in each state. Were it otherwise, a Vermont use tax might be avoided altogether "by the simple expedient of buying and using the property outside the [state] for a period sufficiently long to avoid the imposition of such a tax." Atlantic Gulf & Pac. Co. v. Gerosa, 16 N.Y.2d 1, 209 N.E.2d 86, 89 (1965). It is important to note, moreover, that the use tax imposed upon Plaintiffs is not upon the original price of the motor vehicles, but only on their value at the time they were brought into the state.

While the overall tax burden on the Plaintiffs may be greater than on a state resident who does not move, we are persuaded that this difference is supported by their use of the highways of

more than one state. In any event, the test for an equal protection claim is whether discrimination occurs within the state, and we find that it does not. The state exacts a use tax upon the value of all cars used within the state, regardless of whether they were purchased by residents or nonresidents, and Plaintiffs have failed to demonstrate that they would have been treated any differently had they been Vermont residents when they purchased their cars.

Plaintiffs have also failed to show any infringement of their right to travel freely between states. They, like Vermont residents, have merely been compelled to pay for the privilege of using Vermont highways.

The test of whether a statute infringes on the right of free interstate travel is whether it "has no other purpose than to chill the assertion of

constitutional rights by penalizing those who choose to exercise them." Place v. Place, 129 Vt. 326, 328, 278 A.2d 710 (1971), citing Shapiro v. Thompson, 394 U.S. 618 (1969). Clearly, not every differential between states can be said to violate the fundamental right to travel.

Unlike Shapiro, the regulation in question does not inflict a severe penalty or have "dire effects". See Starns v. Malkerson, 401 U.S. 985 (1971), aff'g without opinion 326 F.Supp. 234 (D. Minn. 1970). As one commentator has stated, "[right to travel] cases may . . . be understood more readily as revolving about the issues of welfare and poverty and not truly about the fundamental right to travel." L.Tribe, American Constitutional Law 1005. We are persuaded that the denial of welfare benefits or emergency medical relief for a year, or an extended residency requirement in order to vote,

offer a very different kind of impediment to travel between states than does the very minimal monetary outlay compelled by 32 V.S.A. §8903. The imposition of a use tax on vehicles purchased out-of-state does not impede the right to travel, even in the absence of a credit for previously paid sales tax.

Nor is the Court persuaded that Vermont's use tax violates the Privileges and Immunities Clause of the United States Constitution. 68 Am.Jur. 2d Sales and Use Taxes §197; State v. Fields, 27 Ohio L.Abs, 662, 35 N.E.2d (1938). To support a claim that a taxing statute abridges constitutional privileges and immunities, Plaintiffs must demonstrate that they are treated differently from state citizens without a reasonable basis. Wheeler v. State, 127 Vt. 361, 366, 249 A.2d 887 (1969), citing Travis V. Yale & Towne Mfg. Co., 252 U.S. 60, 79. Since we have

concluded that the difference in treatment afforded residents and nonresidents, if any, has a reasonable basis, we conclude that Plaintiffs have failed to demonstrate that the statutes in question violate the Privileges and Immunities Clause of the constitution.

With respect to Plaintiffs' claim regarding a violation of the Commerce Clause, we conclude that no discrimination against interstate commerce has been demonstrated. The Vermont use tax statues do not discourage purchases from out-of-state retailers, or benefit in-state retailers at another state's expense. At most, assuming that the nonresident knew at the time of purchase that he intended to establish residency in Vermont, the statutes would furnish an incentive to move prior to the acquisition of an out-of-state motor vehicle.

The Proportional Contribution Clause of the Vermont Constitution has been construed by the Court as the practical equivalent of the Equal Protection Clause of the federal constitution. Pabst v. Commissioner of Taxes, 136 Vt. 126, 388 A.2d 1181 (1978). For the same reasons the Court found no infringement of the Fourteenth Amendment, therefore, we conclude that Plaintiffs have failed to demonstrate that the Proportional Contribution Clause has been violated.

In view of the foregoing, it is hereby ORDERED AND ADJUDGED:

The Motion to Dismiss filed by the Defendants is GRANTED.

Dated at Montpelier, Vermont this

24th day of February, 1983.

/s/ James L. Morse
James L. Morse
Superior Judge

/s/ Willis C. Bragg
Willis C. Bragg

/s/ Patricia B. Jensen
Patricia B. Jensen

No. 83-157

LEONARD G. LEVERSON	)	SUPREME COURT
	)	
	)	ON APPEAL FROM
v.	)	DISTRICT COURT
	)	OF VERMONT,
WILLIAM H. CONWAY, VERMONT DEPARTMENT OF MOTOR VEHICLES	)	UNIT NO. 1, RUTLAND CIRCUIT

November Term, 1983

Francis B. McCaffrey, J.

Leonard G. Leverson, pro se, Pittsford, plaintiff-appellant

John J. Easton, Jr., Attorney General, and Andrew M. Eschen, Assistant Attorney General, Montpelier, for defendant-appellee

PRESENT: Billings, C.J., Hill, Underwood, Peck and Gibson, JJ.

GIBSON, J. On May 29, 1982, while residing in Wisconsin, plaintiff purchased a 1979 Subaru station wagon for the sum of $4325. He paid a five percent sales tax of $216.25 to the state of Wisconsin. In July 1982 plaintiff moved to Vermont. Upon registering his vehicle in Vermont in August 1982, plaintiff was required to pay a use tax of $112 as a condition of

registration. The use tax, computed at the rate of four percent on a low book value of $2800 as of the date of registration was paid by plaintiff under protest. Subsequently, plaintiff brought suit to recover the $112. The matter was submitted to the small claims court on an agreed statement of facts. Upon the entry of judgment for defendant, plaintiff appealed, presenting the following issues for our consideration.

> (1) Whether the Vermont motor vehicle purchase and use tax (32 V.S.A. §8901 et seq.) violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by its failure to afford to a new resident credit for the sales tax paid on an automobile purchased, used, and registered in a former state of residence;
>
> (2) Whether the Vermont motor vehicle purchase and use tax violates the Proportional Contribution Clause (Ch. I, Art. 9) of the Vermont Constitution by its failure to afford to a new resident credit for the sales tax paid on an automobile purchased, used, and registered in a former state of residence;

> (3) Whether the Vermont motor vehicle purchase and use tax violates the Privileges and Immunities Clause of Article IV, §2, cl. 1 of the United States Constitution by its failure to afford to a new resident credit for the sales tax paid on an automobile purchased, used, and registered in a former state of residence; and
>
> (4) Whether the Vermont motor vehicle purchase and use tax violates the Commerce Clause (Art. I, § 8, cl. 3) of the United States Constitution by its failure to afford to a new resident credit for the sales tax paid on an automobile purchased, used, and registered in a former state of residence.

32 V.S.A. §8903 imposes a tax of four percent, or $600, whichever is smaller, upon the purchase and use of motor vehicles within the State of Vermont. The tax is payable by residents of the state at the time of purchase, id. §8903(a), or, if the vehicle is purchased out-of-state, at the time the vehicle is first registered for use within the state. Id. §8903(b).

Residents who purchase pleasure cars outside the state and pay a sales or use

tax to another state are exempt from paying a use tax to the State of Vermont, at least to the extent of the tax paid the other state, providing the state of purchase has a reciprocal agreement with Vermont that grants a similar credit for Vermont tax paid under similar circumstances. Id. §8911(9).

Until recently, a nonresident who purchased, registered and used his pleasure car in another state for at least thirty days was also granted an exemption; however, that exemption was repealed effective September 1, 1980. 1979 No. 202 (Adj. Sess.), §3, Pt. VI, eff. Sept. 1, 1980 (repealing 32 V.S.A. §8911(6)). As a result of the repeal, a nonresident who moves to Vermont and desires to register his motor vehicle here must pay the State of Vermont a use tax of four percent of the fair market value of his vehicle as of the time of registration. Although

Wisconsin is a state that has a reciprocal agreement with the State of Vermont, the plaintiff, as a person who purchased his vehicle while a resident of Wisconsin and registered and used it in that state for more than thirty days, is not entitled to an exemption in light of the 1980 repeal.

The purpose of the motor vehicle purchase and use tax is to pay for improvement and maintenance of the state and interstate highway systems. 32 V.S.A. §8901. The use tax, an important complement to the sale [sic] tax, is designed "to protect a state's revenues by taking away the advantages to residents of traveling out of state to make untaxed purchases, and to protect local merchants from out-of-state competition which, because of its lower or nonexistent tax burdens, can offer lower prices." Rowe-Genereux, Inc. v. Department of Taxes, 138 Vt. 130, 133-34, 411 A.2d 1345,

1347 (1980). The power of a state to establish a nondiscriminatory tax on the user of goods brought from another state has long been firmly established. Henneford v. Silas Mason Co., 300 U.S. 577 (1937).

Sales and use taxes are different in concept, and they are assessed upon different transactions.

> A sales tax is a tax upon the freedom to purchase . . . . A use tax is on the enjoyment of that which was purchased . . . . Though sales and use taxes may secure the same revenues and serve the same complementary purposes, they are . . . . taxes on different transactions and for different opportunities afforded by a State.

McLeod v. Dilworth, 322 U.S. 327, 330-31 (1944). Because the taxes are intended to complement one another, a person who has paid a tax upon the purchase of a motor vehicle in Vermont is not subject to the payment of a use tax to the state. 32 V.S.A. §8903(b).

We first consider whether Vermont's motor vehicle purchase and use tax violates the Equal Protection Clause. Plaintiff claims that the use tax adversely affects his right to travel and that any infringement of this fundamental right must be viewed with "strict scrutiny" by the courts. The right to travel has been recognized by the United States Supreme Court as a right that "protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents." Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982) (citing Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)). See also Memorial Hospital v. Maricopa County, supra, (one-year county residency requirement for nonemergency medical benefits struck down as penalizing exercise of right to travel without the

showing of a sufficient state interest in justification); Dunn v. Blumstein, 405 U.S. 330 (1972) (one-year residency requirement to vote in state election rejected on ground that no compelling state interest was shown to justify the penalty imposed as a result of the exercise of the right to travel); Shapiro v. Thompson, 394 U.S. 618 (1969) (one-year residency requirement to qualify for welfare benefits struck down on ground that no compelling governmental interest had been shown in justification of the state action penalizing the exercise of the right to travel).

The "strict scrutiny" test is invoked upon a showing of some penalty resulting from the exercise of a fundamental right, such as the right to travel; there is no requirement of a showing that a person was deterred from traveling, only that there was a penalty for doing so. Dunn v.

Blumstein, supra, 405 U.S. at 340. Under the strict scrutiny test, "any classification which serves to penalize the exercise of . . . . [a fundamental] right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." Shapiro v. Thompson, supra, 394 U.S. at 634 (emphasis in original).

Ordinarily, when this Court is called upon to determine whether a tax law violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, the Court is required to impose "only the minimum scrutiny of the so-called 'rational basis test'." Hadwen, Inc. v. Department of Taxes, 139 Vt. 37, 42, 422 A.2d 255, 258 (1980). See Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527 (1959). "This test . . . permits a determination of unconstitutionality only where the relevant law

classifies similar persons for different treatment upon wholly arbitrary and capricious grounds . . . . Where the classification rests upon 'some reasonable consideration of legislative policy,' it will not be found unconstitutional." Hadwen, Inc. v. Department of Taxes, supra, 139 Vt. at 42, 422 A.2d at 258-59 (citing Andrews v. Lathrop, 132 Vt. 256, 259, 315 A.2d 860, 862 (1974)); Allied Stores of Ohio, Inc. v. Bowers, supra, 358 U.S. at 527.

Plaintiff complains that the court below erroneously used the "rational basis" test, applying an insufficient standard to his complaint, and that had the "strict scrutiny" test been applied, the use tax, which plaintiff paid under protest, would have been declared an unconstitutional infringement of plaintiff's right to travel under the Equal Protection Clause, entitling

plaintiff to recover the $112 he paid to the state.

Plaintiff misconceives the nature of the right he seeks to invoke. His right to travel has not been infringed. He suffered no restrictions on his right to travel to Vermont and incurred no penalty as a result of the exercise of this right. He was free to bring his property, including his station wagon, to Vermont without incurring any penalty as a result. He was free to move about the state in public or private conveyance (other than the station wagon) without restriction or penalty, and he was free to obtain a Vermont driver's license without having to pay any use tax on his vehicle. Only when plaintiff sought the privilege of operating that vehicle on Vermont's highways was he required to register it; registration, not the move to Vermont, triggered the use tax obligation. Had

plaintiff not sought to register the vehicle, he would have been under no obligation to pay a use tax on it.

In Wells v. Malloy, 402 F. Supp. 856 (D. Vt. 1975), affirmed without opinion 538 F.2d 317 (2d Cir. 1976), the plaintiffs challenged the constitutionality of the statute providing for suspension of their right to drive following nonpayment of the automobile purchase and use tax. Rejecting plaintiffs' claim, the court held, "[a]lthough a driver's license is an important property right in this age of the automobile, it does not follow that the right to drive is fundamental in the constitutional sense." Id. at 858. Accord Montgomery v. North Carolina Dept. of Motor Vehicles, 455 F. Supp. 338, 342 (W.D.N.C. 1978) (revocation of driver's license for refusal to submit to chemical

tests does not deprive licensee of any fundamental constitutional right).

As was stated in Wells v. Malloy, supra, 402 F. Supp. at 859,

> 'Vermont may no longer be thought of as having only dirt roads and an inadequate transportation and highway system.' (quoting Miller v. Malloy, 343 F. Supp. 46, 50 (D. Vt. 1972)). It is certainly possible to get from place to place using public transportation or by taking advantage of friends of family members.

In analyzing the argument that suspension of the right to drive is "beyond the pale of fair and just collection techniques" and that the State should be limited to refusing to register a motor vehicle when the purchase and use tax is not paid, the court stated,

> The issue is really whether it is easier to find someone to drive one's own car if one cannot drive, or to obtain a registered automobile for one's own use if one can drive but has no other car. Seen in this light, we cannot conclude that suspension of driving privileges is any more harsh or coercive than refusal to register a motor vehicle . . . .

Id. at 862. We agree and conclude that the plaintiff's right to register his motor vehicle does not rise to the level of a fundamental constitutional right, nor does it implicate the fundamental right to travel. Since no fundamental right is involved, the applicable standard for measuring the constitutionality of Vermont's statute is the "rational basis" test.

As stated earlier, under the "rational basis" test we may find a statute unconstitutional "only where the relevant law classifies similar persons for different treatment upon wholly arbitrary and capricious grounds." Hadwen, Inc. v. Department of Taxes, supra, 139 Vt. at 42, 422 A.2d at 258. Any classification of taxation is permissible which "rationally furthers a legitimate state purpose." Zobel v. Williams, supra, 457 U.S. at 60; see

Hadwen v. Department of Taxes, supra, 139 Vt. at 42, 422 A.2d at 259. Since the purpose of the purchase and use tax is to pay for the maintenance and improvement of the state and interstate highway systems, 32 V.S.A. §8901, the tax bears an obviously reasonable relationship to the services provided, namely, the privilege of using those highways.

The Legislature has chosen to grant certain exemptions from the purchase and use tax, see 32 V.S.A. §8911(1)-(13); all non-exempt persons must pay the four percent tax. Among the legislative exemptions - and the only one pertinent hereto - is one for residents who pay a sales or use tax elsewhere on pleasure cars acquired outside Vermont, providing the state or province collecting the tax "would grant the same pro-rata credit for Vermont tax paid under similar circumstances." Id. §8911(9).

We note that the Vermont motor vehicle purchase and use tax does not apply to most nonresidents. Those nonresidents who come into the state to purchase a vehicle and then leave immediately to return to their home states do not have to pay a purchase or use tax to Vermont. See id. §8903(a) (purchase tax is payable "by a resident"). Those who must pay either a purchase tax or the compensating use tax include residents who purchase in Vermont, Id. §8903(a); residents who register cars purchased outside Vermont in a state or province that would no pro-rata credit for any Vermont purchase or use tax paid by one of its residents, id. §8903(b); persons such as plaintiff who move into Vermont and then register cars acquired before they became residents of the state, see id. §8903(a), (b); persons who accept employment or engage in a trade,

profession or occupation in Vermont for a period of at least six months and purchase a car here or operate one for more than 30 days, id. §§8902(2), 8903(a), (b), 23 V.S.A. §§4(30, 301; and any foreign partnership, firm, association or corporation doing business in the state and using vehicles in the state in connection with its business, 32 V.S.A. §§8902(2), 8903(a), (b), 23 V.S.A. §§4(30), 301.

Thus, Vermont's basic policy is clear: those who use the state's highways must contribute toward their maintenance and improvement. It is also the state's policy to encourage residents to support the local economy by refusing to grant credit for taxes paid to any non-reciprocating state or province. The only exemption under the state's policies is for residents who buy in reciprocal states and cannot avoid paying a sales or

use tax to such states. The exemption appears to be based upon a policy of encouraging out-of-staters from reciprocal states to purchase their vehicles in Vermont and pay a sales tax to Vermont, secure in the knowledge that they will not be subject to a duplicate tax in their home states, and upon a legislative assumption that few, if any, tax dollars will be lost through this exercise in comity. Whether the amount of highway tax raised in Vermont in this manner exceeds or falls below the amount lost to other states through the reciprocal arrangement does not appear of record; nevertheless, the exempt classification is based on a reasonable legislative policy or purpose, and, unless wholly arbitrary, must be upheld. Allied Stores of Ohio, Inc. v. Bowers, supra, 358 U.S. at 527; Hadwen, Inc. v. Department of Taxes, supra, 139 Vt. at 42, 422 A.2d at 259.

As mentioned, the exemption is not available to residents who acquire cars in states having no reciprocal agreement with Vermont; nor is the exemption available to new residents, such as plaintiff, who, subsequent to acquiring their vehicles, move to Vermont and seek to register them here. A change in the law so as to provide an exemption to either group would run counter to the state's present policies of requiring user contributions and encouraging purchases within the state, and would result in the loss of tax revenues to the state. With respect to new residents, such as plaintiff, who bring their cars with them, they are beyond the reach of any policy of encouragement to purchase in this state, and there is no reason to exempt them from making a fair contribution to the maintenance and improvement of Vermont's highways. Under the present statutory

scheme, plaintiff pays the same tax and is treated in exactly the same manner as all non-exempt persons, including the resident who purchases his vehicle in a nonreciprocal state.

It is also necessary to keep in mind that §8911(9) is an exemption from the payment of taxes, and exemptions are construed strictly,, with no claim of exemption to be allowed unless shown to be within the necessary scope of the statute. Rock of Ages Corp. v. Commissioner of Taxes, 134 Vt. 356, 359, 360 A.2d 63, 65 (1975). "A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere." Henneford v. Silas Mason Co., supra, 300 U.S. at 587. The fact that plaintiff does not qualify as a member of the exempt class does not deprive him of the equal protection of the law.

Storaasli v. Minnesota, 283 U.S. 57, 62 (1931). "[T]he exemption is a proper and lawful one, and [plaintiff] cannot make out a discrimination against him from the mere fact that he is not in a position to claim it." Id.

We conclude that the exempt classification established by the Legislature is rationally related to a legitimate purpose of state government, namely, the promotion of commerce within the state and the raising of taxes to help maintain and improve the state and interstate highway system, and that the classification is not an arbitrary one. Accordingly, we find no violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

II.

The Proportional Contribution Clause of the Vermont Constitution has been

construed to be the practical equivalent of the Equal Protection Clause. Pabst v. Commissioner of Taxes, 136 Vt. 126, 131 n.2, 132-33, 388 A.2d 1181, 1184 (1978); In re Estate of Eddy, 135 Vt. 468, 472, 380 A.2d 530, 533-34 (1977). For the same reasons stated in Part I above, we conclude that there has been no violation of the Proportional Contribution Clause.

III.

Plaintiff also contends that 32 V.S.A. §8909 violates the Privileges and Immunities Clause of Article IV of the United States Constitution by failing to extend to new residents a credit for sales tax previously paid other States. Before this Court may apply the Clause to §8909, however, we must first decide "whether the [statute] burdens one of those privileges and immunities protected by the Clause." United Building and Construction Trades Council of Camden County and Vicinity v.

Mayor and Council of the City of Camden, 52 U.S. L. W. 4187, 4190 (U.S. February 21, 1984) (No. 81-2110) (citing Baldwin v. Montana Fish and Game Commission, 436 U.S. 371, 383 (1978)). "Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, alike." Baldwin v. Montana Fish and Game Commission, supra, 436 U.S. at 383. Thus the Privileges and Immunities Clause will not come into play unless a basic or fundamental right is involved.

Plaintiff argues that his right to travel is infringed by the requirement that he pay a use tax to register his vehicle, without being granted the same exemption or credit afforded to state residents. As we have previously noted, the right to travel, although a fundamental right, Shapiro v. Thompson,

supra, 394 U.S. at 630, is not involved herein. Accordingly, the Privileges and Immunities Clause of the United States Constitution does not come into play and there has been no violation of that constitutional clause.

IV.

Finally, plaintiff invokes the Commerce Clause in support of his cause, contending that Vermont's purchase and use tax discriminates against interstate commerce by failing to provide equal treatment for out-of-state purchases.

In order for the Commerce Clause to apply, the transaction at issue must be one that comes within the scope of interstate commerce. Because "interstate commerce" is a term of such wide implications and ramifications the courts have carefully avoided any attempt to give it a comprehensive definition. Gross

Income Tax Div. v. J. L. Cox & Son, 227 Ind. 468, 475, 86 N.E.2d 693, 696 (1949).

Generally speaking, the indispensable element in interstate commerce is the importation of people or goods, even one's own goods, into one state from another. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 255-56 (1964); United States v. Hill, 248 U.S. 420, 423-24 (1919). Whether the movement is commercial in nature is immaterial. Heart of Atlanta Motel, Inc. v. United States, supra, 379 U.S. at 256. It has long been settled that when personal property has been brought into a state and come to a permanent rest, or merely halted for a moment before resuming its interstate journey, taxes upon the privilege of use, storage or consumption within the state do not impose an unconstitutional burden on interstate commerce. General Trading Co. v. State Tax Commission, 322 U.S. 335, 338

(1944); Henneford v. Silas Mason Co., supra, 300 U.S. at 582-83; Brown v. Houston, 114 U.S. 622, 633 (1885). In the words of Justice Cardozo, "A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate." Henneford v. Silas Mason Co., supra, 300 U.S. at 583.

There can be no doubt that at all relevant times herein plaintiff and his vehicle had ceased to be in transit. His intention was to move to Vermont, and at the time he sought to register the vehicle both he and the vehicle had come to rest in Vermont. Plaintiff's station wagon had become "part of the common mass of property within the state of destination," id. at 582, and was thus clearly an appropriate subject for the imposition of a non-discriminatory use tax in Vermont.

There has been no violation of the Commerce Clause.

Affirmed.

FOR THE COURT:

/s/ Ernest W. Gibson III
Associate Justice

IN THE SUPREME COURT
FOR THE
STATE OF VERMONT

NORMAN WILLIAMS and SUSAN LEVINE	)	Docket No. 83-139
v.	)	NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
STATE OF VERMONT and WILLIAM H. CONWAY, JR., VERMONT COMMISSIONER OF MOTOR VEHICLES	)	

Norman Williams and Susan Levine, Plaintiff-Appellants in this action, hereby appeal to the Supreme Court of the United States from the final order of the Vermont Supreme Court, entered on June 15, 1984, affirming judgment for Defendants-Appellees. Plaintiff-Appellants' Motion for Reargument in this case was denied on July 9, 1984.

This appeal is taken under 28 U.S.C.

§1257(2).

Dated: Burlington, Vermont
July 25, 1984

THE APPELLANTS

By: /s/ Norman Williams
Norman Williams, Esq.
Gravel, Shea & Wright, Ltd.
Pro Se and Attorney for
Plaintiff-Appellant
Susan Levine
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PROOF OF SERVICE

I, Audrey R. Wells Mitchell, certify that on this 25th day of July, 1984, I served the foregoing Notice of Appeal on the Defendant-Appellee by depositing a true copy in the United States mails, with postage prepaid, addressed to:

Andrew M. Eschen, Esq.
Attorney General's Office
Pavilion Office Building
Montpelier, VT 05602

/s/ Audrey R. Wells Mitchell
Audrey R. Wells Mitchell

Subscribed and sworn to before me this

25th day of July, 1984.

/s/ Trudy A. Cyr
Notary Public, Chittenden County, Vermont
My Commission Expires: February 10, 1987

[PA132]

Filed July 26, 1984

Vermont Motor Vehicle

Purchase and Use Tax

§8901. Purpose

This is an act to impose a purchase and use tax on motor vehicles in addition to any other tax or registration fees. The purpose of this chapter is to thereby improve and maintain the state and interstate highway systems, to pay the principal and interest on bonds issued for the improvement and maintenance of those systems and to pay the cost of administering this chapter. The administration of this chapter is vested in the commissioner of motor vehicles and his authorized representatives. The commissioner may prescribe and publish regulations to carry into effect the provisions of this chapter, which regulations, when reasonably designed to carry out the

intent of this chapter, shall have the same force as if enacted herein.

* * * * *

§8902(2). Definitions

Unless otherwise expressly provided, the words and phrases used in this chapter shall be construed to mean:

. . .

(2) "Resident"--resident shall include all legal residents of this state and in addition thereto any person who accepts employment or engages in a trade, profession or occupation in this state for a period of at least six months. Also in addition thereto any foreign partnership, firm, association or corporation doing business in this state shall be deemed to be a resident as to all vehicles owned or leased and ordinarily used by it in connection with its place of business in

this state. Resident shall not include any person, firm or corporation not required to register motor vehicles by reason of any reciprocity provision with any other state.

* * * * *

§8903. Tax imposed

(a) There is hereby imposed upon the purchase in Vermont of a motor vehicle by a resident a tax at the time of such purchase, payable as hereinafter provided. The amount of the tax shall be four percent of the taxable cost of the motor vehicle or $600.00 for each motor vehicle, whichever is smaller, except that pleasure cars which are purchased for use in short-term rentals shall be subject to taxation under subsection (d) of this section.

(b) There is hereby imposed upon the use within this state a tax of four percent of the taxable cost of a motor vehicle, or $600.00 for each motor vehicle, whichever is smaller, by a person at the time of first registering or transferring a registration to such motor vehicle payable as hereinafter provided, except no use tax shall be payable hereunder if the tax imposed by subsection (a) above has been paid.

(c) The Vermont registration or transfer of Vermont registration of a motor vehicle shall be conclusive evidence that the purchase and use tax applies except as provided in section 8911 of this title.

(d) There is hereby imposed a use tax on the rental charge of each transaction, in which the renter takes

possession of the vehicle in this state, during the life of a pleasure car purchased for use in short-term rentals, which tax is to be collected by the rental company from the renter and remitted to the commissioner. The amount of the tax shall be five percent of the rental charge. Rental charge means the total rental charge for the use of the pleasure car, but does not includes a separately stated charge for insurance, or recovery of refueling costs, or other separately stated charges which are not for the use of the pleasure car. In the event of resale of the vehicle in this state for use other than short-term rental, such transaction shall be subject to the tax imposed by subsection (a) of this section.

(e) Any person registering a pleasure car in this state subject to the tax imposed by subsection (d) which is not

actually rented for not less than 30 days in any single year must pay the tax imposed by subsection (a) or (b) upon demand of the commissioner.

* * * * *

§8905(b). Collection of tax

. . .

(b) Every person subject to a use tax under subsection (b) of section 8903 of this title shall forward such tax form and the tax due to the commissioner with the registration application or transfer, as the case may be, and fee at the time of first registering or transferring a registration to such motor vehicle as a condition precedent to registration thereof.

* * * * *

§8907. Commissioner, computation of taxable costs

The commissioner may investigate the taxable cost of any motor vehicle transferred subject to the provisions of this chapter. If the motor vehicle is not acquired by purchase in Vermont or is received for an amount which does not represent actual value, or if no tax form is filed or it appears to the commissioner that a tax form contains fraudulent or incorrect information, he may, in his discretion, fix the value of said motor vehicle at the average book value of the same make, type, model and year of manufacture as designated by the manufacturer as shown in the Official Used Car Guide, National Automobile Dealers Association (New England edition) or any comparable publication, compute and assess the tax due thereon, and notify the purchaser thereof forthwith by certified

mail, and said purchaser shall remit the same within fifteen days thereafter.

* * * * *

§8909. Enforcement

If the tax due under subsections (a) and (b) of section 8903 of this title is not paid as hereinbefore provided the commissioner shall suspend such purchaser's right to operate a motor vehicle within the state of Vermont until such tax is paid, and such tax may be recovered with costs in an action brought in the name of the state on this statute.

* * * * *

§8911. Exceptions

The tax imposed by this chapter shall not apply to:

(1) motor vehicles owned or registered by any state or province or any political subdivision thereof;

(2) motor vehicles owned and operated by the United States of America;

(3) motor vehicles owned and registered by religious or charitable institutions or volunteer fire companies;

(4) motor vehicles owned and operated by a dealer and registered and operated under the provisions of sections 451-468 inclusive of Title 23;

(5) nonregistered motor vehicles other than tow or repairman vehicles;

(6) [Repealed.]

(7) motor vehicles, title to which on the effective date of this chapter is in the owner seeking registration thereof;

(8) motor vehicles transferred to the spouse, mother, father or child of the donor, or to a trust established for the benefit of any such persons or for the

benefit of the donor, or subsequently transferred among such persons provided such motor vehicle has been registered in this state in the name of the original donor;

(9) pleasure cars acquired outside the state by a resident of Vermont on which a state sales or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another state is less than the Vermont tax the tax due shall be the difference;

(10) motor vehicles registered in Vermont by the transferor and transferred between that individual or partnership and a business entity controlled by the transferor, if the transfer is exempt under section 351 of the United States

Internal Revenue Code in effect July 1, 1966;

(11) motor vehicles owned or purchased in another state by a member of the armed forces on full time active duty or his spouse upon which a purchase, use or sales tax has been paid in another state, except that, if that tax is less than the tax payable in this state but for this subdivision, the tax applies in the amount of the difference;

(12) motor vehicles owned and operated by physically handicapped persons for whom the vehicle's controls have been altered to enable such person to drive. This exception shall apply only when such handicapped person has been certified exempt from the tax by the commissioner of motor vehicles under the provisions of section 8901 of this title;

(13) motor vehicles obtained from the government as excess government property,

or vehicles purchased with 100 percent federal funds and used for federally supported local programs.

Burlington Free Press
Burlington, Vermont
Tuesday, June 19, 1984

Court Upholds Vehicle Use Tax

The Associated Press

Montpelier -- Vermont's motor vehicle use tax has been upheld by the state Supreme Court.

The tax was challenged by Leonard Leverson, who moved to Vermont from Wisconsin in 1982 and was required to pay a tax of $112 to register his car.

Leverson claimed the fee was unconstitutional because he had paid a sales tax to the state of Wisconsin when he bought the car.

Vermont imposes a tax of 4 percent, or $600, whichever is smaller, on the purchaser and use of motor vehicles in the

state. A person who moves to Vermont from another state is required to pay the tax when he registers his car in Vermont.

Leverson challenged that system, saying it violated the 14th Amendment because it did not give new residents credit for the sales tax they paid in their former state.

The Vermont Supreme Court ruled, however, that a person's right to register his car does not amount to a constitutional privilege.

Assistant Attorney General Andrew Eschen, assigned to the Vermont Transportation Agency, said roughly $1 million a year in revenue was at stake in the case.

[PA1312]

No. 84-592

In The
Supreme Court of the United States
October Term, 1984

NORMAN WILLIAMS and SUSAN LEVINE,
Appellants,
v.
STATE OF VERMONT and
WILLIAM H. CONWAY, JR., COMMISSIONER,
VERMONT DEPARTMENT OF MOTOR VEHICLES,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

APPELLANTS' BRIEF

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QUESTIONS PRESENTED

1. Does a state motor vehicle "use" tax, which facially discriminates on the basis of residency in granting tax credits, violate the Equal Protection or Privileges and Immunities Clause of the United States Constitution?

2. Does the Commerce Clause prohibit a state from imposing a "use" tax on property brought from another state without granting credit for sales tax paid to the state of origin?

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OPINIONS BELOW

The Opinion of the Supreme Court of Vermont was not reported but is reprinted at p. 20 of the Joint Appendix (J.A.). (The opinion upon which the Vermont Supreme Court relied, *Leverson v. Conway*, 114 Vt. 523, 481 A.2d 1029 (1984), is reprinted at p. 21 of the Joint Appendix).

The unreported Order of the Vermont Supreme Court denying appellants' motion for reargument is reprinted at p. 38 of the Joint Appendix.

The unreported Opinion of the Superior Court of Vermont for Washington County is reprinted at p. 11 of the Joint Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). This appeal was docketed within ninety days from the entry of the Order of the Supreme Court of Vermont denying reargument in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV, § 1, cl. 4, United States Constitution:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article IV, § 2, cl. 1, United States Constitution:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Article I, § 8, cl. 3, United States Constitution:

The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .

Vt. Stat. Ann. tit. 32, §§ 8901, 8902(2), 8903, 8905(b), 8907, 8909, 8911:

[The pertinent text of these statutes is reprinted at pages 48a-59a of the Jurisdictional Statement.]

STATEMENT OF THE CASE [1]

Appellant Williams

On February 1, 1981, appellant Norman Williams moved to Vermont, where he now lives. He brought with him a 1980 Volkswagen Dasher Diesel, purchased for $9,300 in Chicago Heights, Illinois, on December 10, 1980. At the time of the purchase he paid a five percent Illinois sales tax, or $465.

Appellant Williams' Illinois registration expired on September 30, 1981. As a Vermont resident under Vt. Stat. Ann. tit. 23, § 4(30), he was then required to register his motor vehicle in Vermont by Vt. Stat. Ann. tit. 23, § 301. (Vt. Stat. Ann. tit. 23, §§ 4(30) and 301 are reprinted at Appendix B to this Brief). Absent payment, the Department of Motor Vehicles and Appellee William Conway, its Commissioner, refused vehicle registration.

After an action filed in Federal District Court for the District of Vermont challenging the tax was dismissed on jurisdictional grounds under the Tax Injunction Act, appellant Williams on August 27, 1982, again presented a completed Registration Tax and Title Application to the Department of Motor Vehicles. Based on a "low book" value for the car of $4,300, the Department assessed and appellant Williams paid under protest a four percent tax of $172. After paying the tax, Williams requested a hear-

1. This statement is based on appellants' amended complaint, J.A. 4. Because this case is appealed from an Order of the Vermont Superior Court granting appellees' motion to dismiss, J.A. 11, the allegations in the amended complaint, and all reasonable inferences that may be drawn therefrom, must be assumed to be true under Rule 12, V.R.Civ.P. *See, e.g., Bressler v. Keller,* 139 Vt. 401, 429 A.2d 1306 (1981).

ing before the Department of Motor Vehicles. In findings of fact and a decision dated October 26, 1982, the hearing officer ruled that the Department could not reach the constitutional questions raised and dismissed the appeal.

Appellant Williams on November 22, 1982, filed a complaint in the Superior Court for Washington County, Vermont, seeking a refund of the tax paid and a declaratory judgment that Vermont's purchase and use tax scheme for motor vehicles was unconstitutional under the Equal Protection Clause, Privileges and Immunities Clause, and Commerce Clause of the U.S. Constitution and under the Proportional Contribution Clause of the Vermont Constitution. In lieu of answering the complaint, Appellees on December 23, 1982, moved to dismiss under Rule 12, V.R. Civ.P. J.A. 3.

Appellant Levine

On January 23, 1983, before any judgment in the case was rendered, appellant Susan Levine moved to intervene in *Williams v. Vermont* as a party-plaintiff, and an amended complaint stating the claims of both appellants was filed. J.A. 4. Miss Levine had moved to South Burlington, Vermont, from Saranac Lake, New York, in November, 1979. She brought with her a 1979 Chrysler Horizon purchased on September 29, 1978, for $4,923.40 from Upstate Service and Body Works, Inc., in Saranac Lake, New York. At the time of purchase, she had paid a seven percent New York sales tax, or $344.64.

On December 16, 1982, and before expiration of her New York registration, Miss Levine presented a completed Registration Tax and Title Application to the Vermont Department of Motor Vehicles. Based on a "low

book" value of $2,750, the Department of Motor Vehicles assessed, and appellant Levine paid, a four percent "use" tax to Vermont of $110.

The Vermont Superior Court granted appellant Levine's motion to intervene on January 26, 1983. J.A. 1. It granted the Appellees' motion to dismiss on February 24, 1983. The Superior Court held that, although the Vermont motor vehicle purchase and use tax did discriminate on the basis of residency, such discrimination was "rationally related" to the cost of maintaining state highways and therefore did not violate the Equal Protection Clause. It applied the same "rational basis" test in concluding that the statutory scheme did not violate the Privileges and Immunities Clause. Finally, the Superior Court ruled that no "discrimination against interstate commerce" had been "demonstrated" and dismissed appellants' claim under the Commerce Clause of the U.S. Constitution as well. J.A. 11.

Appellants filed a notice of appeal to the Vermont Supreme Court on March 22, 1983. J.A. 19. They asserted the same four claims for relief before the Vermont Supreme Court: violation of the Equal Protection, Privileges and Immunities, and Commerce Clauses of the U.S. Constitution and violation of the Proportional Contribution Clause of the Vermont Constitution. After submission of memoranda and oral argument, the Vermont Supreme Court rejected appellants' claims and affirmed the lower court's dismissal. The appellants moved for reargument on June 27, 1984, based in part on this Court's decision in *Armco, Inc. v. Hardesty,* 52 U.S.L.W. 4787 (1984). J.A. 35. That motion was denied without opinion by the Vermont Supreme Court on July 9, 1984. J.A. 38.

SUMMARY OF ARGUMENT

This appeal challenges a discriminatory Vermont tax scheme in which "[p]rovincial interests and local political power are at their maximum." *Nippert v. City of Richmond*, 327 U.S. 416, 434 (1946). The law in question—Vermont's motor vehicle purchase and use tax—requires out-of-staters who move to Vermont to pay a four percent tax on their cars. Residents in otherwise identical circumstances completely avoid the tax. Appellants believe the tax scheme violates the Equal Protection, Privileges and Immunities, and Commerce Clauses of the United States Constitution.

Vermont's motor vehicle tax works through a system of credits. Nominally, the state requires all persons registering their cars for the first time to pay a four percent "purchase and use" tax on the value of their cars. However, Vermont *residents* who acquired cars in other states are granted a credit for sales tax paid there. Nonresidents in the same circumstances are denied that credit.[2]

Here, appellant Levine paid a purchase and use tax of $110 to register her car in Vermont, even though she had already paid sales tax of $344.64 to New York. Appellant Williams paid purchase and use tax of $172 to register his car in Vermont, even though he had already paid sales tax of $465 to Illinois. (Such charges were in

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2. Vermont is one of only four states which does not grant a sales tax credit with respect to motor vehicles purchased elsewhere. The other three states, Indiana, Maryland and Oklahoma, deny the credit to everyone, not just nonresidents or recent residents. A compilation of the relevant statutes of all 50 states is set forth in Appendix B to this Brief.

addition to the flat registration fee imposed by the Vermont Motor Vehicle Department.) Because they were not Vermont residents when they purchased their cars, neither appellant was granted a sales tax credit. Vermont residents in exactly the same circumstances as appellants would have been granted a credit and would have paid *no* purchase and use tax to Vermont.

The resident/nonresident discrimination manifest in Vermont's motor vehicle tax scheme violates the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of art. IV, § 2 of the Constitution. With respect to the Equal Protection Clause, the statute infringes appellants' fundamental "right to travel" or, more precisely, their "right to interstate migration." The announced purpose of the law—enhancement of the state highway fund—simply does not pass constitutional muster. With respect to the Privileges and Immunities Clause, the Vermont law plainly violates a "norm of comity" by imposing greater tax burdens on nonresidents than on residents in identical circumstances. (It also affects appellants' constitutionally-protected rights to travel, hold property and pursue a livelihood.) Because nonresidents do not constitute a "peculiar source" of highway deterioration, the law cannot survive the Privileges and Immunities Clause.

Apart from its discriminatory aspect, Vermont's motor vehicle purchase and use tax violates the Commerce Clause of the Constitution. As the Vermont Supreme Court has stated, the tax is designed to encourage individuals to purchase cars in Vermont. Were similar laws enacted in other states, automobile buying patterns in this nation would be substantially altered. Such economic dis-

tortion is not permitted by the Commerce Clause. While states may impose use taxes to *equalize* tax burdens on in-state and out-of-state purchases, they may not encourage local purchases by imposing *higher* taxes on goods acquired out-of-state.

ARGUMENT

I. Vermont's Motor Vehicle Purchase And Use Tax Fails To Meet The Requirements Of The Equal Protection Clause.

The right of strangers or newcomers to equal treatment under the law is a right which runs through this nation's history,[3] as it does through western civilization.[4] In

3. In 1776, a committee of the Continental Congress drafted two articles forbidding one colony from discriminating against inhabitants of another. *See* Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 Wm. & Mary L. Rev. 1, 2-5 (1967). These two prohibitions were incorporated into Article IV of the Articles of Confederation the following year, then shortened to form art. IV, § 2 of the U.S. Constitution in 1789. Judicially, Justice Washington recognized the right to travel in *Corfield v. Coryell*, 6 Fed. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230), and it has been consistently applied since. For a history of judicial protection in the United States against discrimination based on residency, see J. Nowak, R. Rotunda & J. Young, *Constitutional Law*, 807-809 (2d ed. 1983). *See also*, Z. Chafee, *Three Human Rights In The Constitution of 1787* (1956).

4. As noted in *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 261 (1974), the Old Testament commands, "Ye shall have one manner of law, as well for the stranger, as one of your own." *Leviticus* 24:22 (King James). In England, legal protection of "alien friends" has been shown to be rooted in the Magna Carta. *See* R. Howell, *The Privileges and Immunities of State Citizenship*, 9-13 (1918).

our federal system, that right provides an important counter-balance to state sovereignty—individuals dissatisfied with the laws of a particular state government are free to "vote with their feet" by migrating elsewhere without penalty.[5]

This right has been judicially recognized as the "right to travel" or, more particularly in this case, the "right to free interstate migration."[6] As this Court stated in *United States v. Guest*, 383 U.S. 745, 757-758 (1966):

> The constitutional right to travel from one state to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept

5. For a discussion of the "structural" aspect of the "right to travel" in our federal system, *see Austin v. New Hampshire*, 420 U.S. 656, 662 (1975).

6. The right to free interstate migration is a distinct subspecies of the broader right to travel, as this Court pointed out in *Memorial Hospital*, 415 U.S. at 255 (1974):

> [T]he right to travel was involved only in a limited sense in *Shapiro [v. Thompson*, 394 U.S. 618 (1969)]. The Court was there concerned only with the right to migrate "with intent to settle and abide," or, as the Court put it, "to migrate, resettle, find a new job, and start a new life."

In this context, the Vermont Supreme Court's conclusion that the right to travel is not implicated in this case because "[i]t is certainly possible to get from place to place using public transportation or by taking advantage of friends or family members," *Leverson*, 144 Vt. at 530, 481 A.2d 1029 (1984), J.A. 27, (quoting *Wells v. Malloy*, 402 F.Supp. 856, 859 (D.Vt. 1975)), is very much beside the point. Appellants complain because, as nonresidents, they must pay a tax that residents in identical circumstances do not. It is only incidental that this tax, because it is levied on automobiles, may also affect appellants' ability "to get from place to place," as the Vermont Supreme Court put it.

> of our Federal Union. It is a right that has been firmly established and repeatedly recognized.

This Court has vindicated the "right to travel" by striking down state laws concerning taxes,[7] welfare,[8] medical benefits,[9] voting rights,[10] and, most recently, dividend payments which discriminate on the basis of residency.[11] Each of these decisions has been grounded on the Equal Protection Clause of the Fourteenth Amendment.

The fact of discrimination based on residency by the state of Vermont is undeniable in this case. As the Vermont Superior Court stated, "We are persuaded that 32 V.S.A. 8911 does not afford, on its face, equal treatment to residents and nonresidents who purchase cars out-of-state." J.A. 14.

More precisely, Vermont discriminates against *new* residents and in favor of old ones. Under Vt. Stat. Ann.

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7. *WHYY, Inc. v. Borough of Glassboro,* 393 U.S. 117 (1968) (New Jersey statute denying tax exemption to foreign nonprofit corporations struck down); *Wheeling Steel Corp. v. Glander,* 337 U.S. 562 (1949) (Ohio tax on intangible personal property held by foreign corporations or nonresidents held invalid).

8. *Shapiro v. Thompson,* 394 U.S. 618 (1969) (no durational residency requirement permitted with respect to receipt of welfare benefits).

9. *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974) (statute requiring one year residence in county prior to receipt of non-emergency asthma treatment struck down).

10. *Dunn v. Blumstein,* 405 U.S. 330 (1972) (one-year residency requirement to vote in state election rejected); *Oregon v. Mitchell,* 400 U.S. 112 (1970) (federal voting rights statute abolishing residency requirements for federal elections upheld).

11. *Zobel v. Williams,* 457 U.S. 55 (1982) (statute distributing income derived from state's natural resources to state citizens in varying amounts based on length of residency invalid).

tit. 32, §8903(b), all residents, new or old, who register their cars in Vermont for the first time are nominally required to pay a four percent tax on the cost of their car[12] or $600, whichever is less, unless they paid a sales tax *to Vermont* when purchasing their car. For those who did not purchase their cars in Vermont, the crucial question is whether they were Vermont residents at the time of purchase. If so, they are entitled to a credit for sales tax paid to the other state, provided that state would grant credit for Vermont taxes paid under similar circumstances. Vt. Stat. Ann. tit. 32, §8911(9).[13] If not, they are denied any tax credit.[14]

The plain effect of Vermont's statute is to impose a tax on those who come to Vermont which is not imposed

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12. Although Vt. Stat. Ann. tit. 32, § 8903(b) requires the tax to be computed on the basis of the cost of the car, the Vermont Department of Motor Vehicles, as a matter of practice, determines it on the basis of the car's current or "book" value.

13. In this case, both of the states where appellants purchased their cars, New York and Illinois, do grant reciprocal credit. According to the Vermont Department of Motor Vehicles, 35 states grant such credit.

14. Nonresidents were granted an identical credit until September 1, 1980, when Vt. Stat. Ann. tit. 32 § 8911(6) was repealed. As enacted in 1960, former section 8911 provided:

> The tax imposed by this act shall not apply to:
>
> . . .
>
> (6) pleasure cars, the owners of which were not residents of this state at the time of purchase and had registered and used the vehicle for at least thirty days in a state or province other than Vermont.

1959 Vt. Acts No. 327, § 10 (Adj. Session).

on those already there. Because tax discrimination based on residency is plain under the statute,[15] the issue in the case becomes whether that discrimination can be justified by a legitimate state interest. Since Vermont law effectively imposes a penalty for changing one's residence, appellants believe that "heightened" or "strict" scrutiny is appropriate under the Equal Protection Clause. However, appellants also contend that the Vermont law could not survive even the so-called "rational basis" test under such decisions as *Zobel v. Williams,* 457 U.S. 55 (1982); *WHYY v. Glassboro,* 393 U.S. 117 (1968); and *Wheeling Steel Corp. v. Glander,* 337 U.S. 562 (1949).

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15. Appellants note that the State, in its Motion to Dismiss or Affirm filed with this Court in the related case of *Leverson v. Conway,* No. 84-315 (1984), has asserted for the first time that individuals in appellants' position would have been required to pay the Vermont motor vehicle purchase and use tax even if they were residents of Vermont when they acquired their cars out-of-state. Appellee's Motion to Dismiss at 4. This assertion flies directly in the face of Vt. Stat. Ann. tit. 32, § 8911(9). It is also contrary to the opinion of the Vermont Supreme Court in *Leverson:*

> Residents who purchase pleasure cars outside the state and pay a sales or use tax to another state are exempt from paying a use tax to the State of Vermont, at least to the extent of the tax paid the other state, providing the state of purchase has a reciprocal agreement with Vermont that grants a similar credit for Vermont Tax paid under similar circumstances. [32 V.S.A.] § 8911(9).

144 Vt. at 527.

That interpretation of the Vermont Supreme Court accords with appellants' view and is, of course, binding on this Court. *See Wheeling Steel Corporation v. Glander,* 337 U.S. 562, 566 (1949) (statutory interpretation of Ohio Supreme Court becomes part of the statute for purposes of the U.S. Supreme Court).

A. Vermont's Discriminatory Tax Laws Cannot Survive The "Heightened" or "Strict" Scrutiny Appropriate Under The Equal Protection Clause In This Case.

The Court defined the relationship between the right to travel and the modern equal protection analysis in *Shapiro v. Thompson,* 394 U.S. 618 (1969). *Shapiro* involved durational residency requirements imposed on indigents as a condition of receiving welfare benefits. The requirement resulted in two classes: those who had lived in the state more than a year and those who had not. In deciding whether that classification violated the Equal Protection Clause, the Court was faced with the question of which equal protection standard to apply:

> At the outset, we reject appellants' argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification. The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved in to the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right [to travel], and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.

394 U.S. at 634 (citations omitted) (emphasis in original).

Shapiro went on to find that the primary purpose for the residency requirement—the fiscal integrity of the state's welfare benefit program—could not meet the heavy burden imposed by the compelling state interest test. Although the state's concerns were legitimate, the Court said, "a State may not accomplish such a purpose by invidious

distinctions between classes of its citizens. . . . [A]ppellants must do more than show that denying welfare benefits to new residents saves money." 394 U.S. at 633.

Decisions following *Shapiro* have clarified its holding that plaintiffs alleging a violation of their right to travel need not demonstrate that a particular law *deterred* them (or anyone else) from moving but only that they were *penalized* for doing so. As the Court said in *Dunn v. Blumstein,* 405 U.S. 330 (1972):

> Shapiro did not rest upon a finding that denial of welfare actually deterred travel. Nor have other "right to travel" cases in this Court always relied on the presence of actual deterrence. In Shapiro we explicitly stated that the compelling state interest test would be triggered by "any classification which serves to *penalize* the exercise of that right [to travel] . . ."

405 U.S. at 340 (emphasis and bracketed material in original).

In *Dunn,* and in such cases as *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1978), a "strict scrutiny" analysis applied and the challenged state statute was invalidated under the Equal Protection Clause. *See also Oregon v. Mitchell,* 400 U.S. 112, 238 (1970) (Opinion of Brennan, White, and Marshall, JJ.), and *Zobel v. Williams,* 457 U.S. 55, 66 n.1 (1982) (Brennan, Marshall, Blackmun, and Powell, JJ., concurring).

In this case, Vermont violates the appellants' right to travel from state to state by effectively imposing a penalty, in the form of a four percent tax on their automobiles, for the decision to reside in Vermont. The only official justification advanced for the tax is to guarantee the fiscal integrity of the state's highway system. *See* Vt.

Stat. Ann. tit. 32, §8901 ("The purpose of this chapter is to thereby improve and maintain the state and interstate highway system, to pay the principal and interest on bonds issued for the improvement and maintenance of those systems and to pay the cost of administering this chapter").[16] That justification does not meet the compelling state interest test imposed by the Equal Protection Clause in these circumstances. As the Court said in *Memorial Hospital*:

> The conservation of the taxpayer's purse is simply not a sufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State.

415 U.S. at 263. *See also Sosna v. Iowa,* 419 U.S. 393, 544 (1975) (budgetary considerations insufficient to outweigh constitutional claims of individuals under Equal Protection Clause).

B. Vermont's Motor Vehicle Purchase And Use Tax Also Fails To Meet The "Rational Basis" Test Of The Fourteenth Amendment.

In *WHYY, Inc. v. Borough of Glassboro,* 393 U.S. 117 (1968); *Wheeling Steel Corporation v. Glander,* 337 U.S. 562 (1949); and, most recently, *Zobel v. Williams,* 457 U.S. 55 (1982), this Court overturned state statutes which discriminated on the basis of residency under the Equal Protection Clause without determining whether a "heightened

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16. The Vermont Supreme Court suggested another possible legislative purpose behind the motor vehicle tax scheme: encouragement of in-state motor vehicle purchases. *See Leverson,* 144 Vt. at 532, 481 A.2d at 1034, 1035 (1984), J.A. 29. As appellants demonstrate in Part III of this Brief, such a purpose is entirely illegitimate under the Commerce Clause.

scrutiny" or "rational basis" analysis applied. The reasoning of those cases applies with equal force here and supports reversal of the Vermont Supreme Court's decision.

Like the instant case, both *WHYY* and *Wheeling Steel* involved discriminatory state taxes. In *WHYY*, the New Jersey Supreme Court had ruled that a Pennsylvania nonprofit television station with facilities in New Jersey was not entitled to the same property tax exemptions as a similar New Jersey corporation. It held that the state's asserted interest in avoiding additional administrative burdens "was not wholly irrational and sustained the denial of exemption." 393 U.S. at 199. This Court disagreed, finding that the asserted interest did not make sense: it was no more difficult to determine whether a foreign corporation met state law criteria for nonprofit status than it was to make the same determination for a local corporation. Accordingly, the *WHYY* Court reversed, holding that the Pennsylvania station could not be treated unequally "'solely because of the different residence of the owner.'" 393 U.S. at 120 (quoting *Wheeling Steel Corp.*, 337 U.S. at 572).

A similar result obtained in *Wheeling Steel*. There, Ohio had imposed an *ad valorem* tax on intangibles, such as notes or accounts receivable, held by foreign corporations or nonresidents with respect to goods manufactured in Ohio. Identical property owned by residents or domestic corporations was exempt from the tax, however. Ohio attempted to justify this resident/non-resident discrimination by arguing that other states could levy the same tax on Ohio residents, thus establishing a national equality of treatment. 337 U.S. at 573. This Court decisively rejected that reasoning: "It is clear that this plan of 'reciprocity' is not one which by credits or otherwise protects the nonresident or foreign corporation against the discriminations apparent in the Ohio statute." *Id.* at 574. It therefore invalidated the law as an impermissible violation of the Equal Protection Clause.

Most recently, in *Zobel*, this Court held that cash dividends could not be distributed by Alaska based on length of residency under the Equal Protection Clause. The Alaska Supreme Court had indicated three purposes for the residency distinctions: 1) a financial incentive to establish and maintain residence in Alaska; 2) prudent management of the state's natural resources fund; and 3) apportionment based on "tangible and intangible contributions" by residents over the years. 457 U.S. at 61. The *Zobel* Court rejected all three. The first two, it said, bore no rational relation to the statutory discrimination based on length of residence. The final purpose, while perhaps "rational," was not legitimate under the Fourteenth Amendment:

> Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency. It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible.

457 U.S. at 64.

Vermont's discriminatory motor vehicle tax should also be rejected by this Court, even without "strict scrutiny" analysis under the Equal Protection Clause. The Vermont legislature has stated that the tax scheme is intended to swell Vermont's coffers, Vt. Stat. Ann. tit. 32,

§ 8901, and it is undoubtedly successful in this aim.[17] However, as *WHYY, Wheeling Steel,* and *Zobel* make clear, such a purpose cannot justify discrimination based on residency under the Fourteenth Amendment.

C. Those Decisions Upholding State Durational Residency Requirements Do Not Support Vermont's Discriminatory Tax Scheme In This Case.

While it is true that this Court has upheld state "durational residency" requirements against equal protection challenges in several cases, none of those decisions support the discrimination here. Each of those cases involved either: 1) a political right which went to the core of state governmental autonomy; or 2) a state benefit which had to be limited to bona fide residents if it was to be provided at all. Thus, in *Rosario v. Rockefeller,* 410 U.S. 752 (1973), this Court upheld a state statute requiring voters to enroll in the party of their choice 30 days before a general election in order to vote in the following primary and, in *Dunn v. Blumstein,* indicated its approval of "[a]n appropriately defined and uniformly applied requirement of bona fide residence" with respect to state elections. 405 U.S. at 343-344. Both *Rosario* and *Dunn* recognize that

17. As noted in appellants' Jurisdictional Statement, Appellees' counsel has stated publicly that about $1 million is brought into the state annually from the challenged tax on nonresidents. *Id.* at 12, n. 2. That figure appears to agree roughly with the most recent census figures, which suggest that about 14,400 individuals migrate to Vermont annually. See 1 Bureau of Census, U.S. Dept. of Commerce, *Characteristics of Population* 31 (1980). If one-fourth of such individuals owned automobiles on which they paid a purchase and use tax averaging $250 each, the amount generated annually would be $850,000.

state government, if it is to represent and enact laws to serve the needs of its residents, must be able to limit participation in the political process to bona fide state residents.

A state is also permitted to limit receipt of certain government benefits, as the Court recently held in *Martinez v. Bynum,* 103 S.Ct. 1838 (1983), and *Vlandis v. Klein,* 412 U.S. 441 (1973). *Martinez* ruled that a state may deny free public school education to children who come to the district primarily for free public education and whose parents or guardians do not reside there. In *Vlandis,* the Court indicated its approval of a Minnesota statute requiring one year of residency in order to qualify for lower, in-state college tuition (although *Vlandis* itself invalidated a Connecticut statute which forever barred nonresidents from becoming residents for the purposes of in-state tuition). *See* 412 U.S. at 452-453, n.9, citing with approval *Starns v. Malkerson,* 401 U.S. 985 (1971), *aff'g* 326 F. Supp. 234 (D.Minn. 1970). Both *Martinez* and *Vlandis* recognize that certain state-provided benefits, such as public education, must be limited to bona fide residents if they are to be provided properly to anyone.[18]

18. *Sosna v. Iowa,* 419 U.S. 393 (1975), which upheld a one-year residency requirement in connection with filing for divorce in Iowa, involved both "sovereignty" and "limited benefit" concerns. As the Court noted, Iowa had valid grounds for insuring a "modicum of attachment to the State." *Id.* at 407. With respect to the sovereignty of its judicial system, Iowa was properly concerned with comity ("officious inter-meddling in matters in which another State has a paramount interest") and reputation ("minimizing the susceptibility of its own divorce decrees to collateral attack"). With respect to providing a limited service, the Court said, "Iowa may quite reasonably decide that it does not wish to become a divorce mill for unhappy spouses who have lived there as short a time as appellant." 419 U.S. at 407.

Neither the political process nor public benefit rationales can justify Vermont's discriminatory motor vehicle tax here. A constitutional prohibition against imposing greater tax burdens on outsiders than on a state's own residents does not jeopardize the state's ability to function as an independent political unit, as in *Rosario* and *Dunn*. Nor can it be argued under *Martinez* or *Starns* that Vermont's ability to maintain a highway system depends on its ability to charge nonresidents a tax which it does not charge residents in similar circumstances. In short, those cases in which the Court has upheld some discrimination between residents and nonresidents simply are not apposite here. They cannot justify Vermont's discriminatory motor vehicle tax scheme.[19]

II. Vermont's Motor Vehicle Purchase And Use Tax Violates Appellants' Rights Under The Privileges And Immunities Clause Of The Federal Constitution.

As this Court has noted, the Privileges and Immunities Clause was designed to prevent legislation discriminating against those with no political voice. The Vermont legislature, in imposing a four percent motor vehicle tax on those moving to Vermont which it does not impose on residents in otherwise identical circumstances, has enacted just such legislation.

This section will analyze Vermont's motor vehicle tax under the modern privileges and immunities test. The test first requires the Court to determine whether the individual right affected bears "upon the vitality of the Nation

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19. The "political process" and "public benefit" distinctions suggested here are explored in greater depth in Varat, *State Citizenship and Interstate Equality,* 48 U. Chi. L. Rev. 487 (1981).

as a single entity," *Baldwin v. Montana Fish and Game Commission,* 436 U.S. 371, 383 (1978), or is required for a "norm of comity," *Austin v. New Hampshire,* 420 U.S. 656, 660 (1975). If so, the challenged statute may not stand unless the nonresidents "constitute a peculiar source of the evil at which the statute is aimed" *and* there is a "substantial relationship" between that evil and the statutory discrimination against nonresidents. *Hicklin v. Orbeck,* 437 U.S. 518, 525-527 (1978). Because the rights asserted here are protected by the Privileges and Immunities Clause, and because appellants do not constitute a peculiar source of highway deterioration or any other "evil," Vermont's discriminatory tax scheme should not be permitted to stand.

A. The Privileges And Immunities Clause Is Intended To Protect The Constitutional Concept Of Federalism.

The Privileges and Immunities Clause of art. IV, § 2, cl. 1 of the U.S. Constitution provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The clause derives directly from the fourth Article of Confederation, which suggests its drafters' concerns:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively.

Although the Clause was shortened when included in the comity article of the Constitution, no diminution in meaning occurred. *Lemmon v. People,* 20 N.Y. 562, 608 (1860); *Paul v. Virginia,* 75 U.S. (8 Wall.) 168, 180 (1869). Indeed, Hamilton deemed the Clause "the basis of Union." *The Federalist* No. 80, at 478 (New American Library ed., 1961). *See also The Federalist* Nos. 3-5 (J. Jay) and Nos. 6-9 and 11 (A. Hamilton).

Now as then, the Privileges and Immunities Clause guarantees residents of each state a "general citizenship" throughout the United States, on an equal footing with residents of every other state. 2 Story, *Commentaries on the Constitution* § 1806 at 599 (4th ed. 1873).[20] The intent of the Clause is well-summarized in the leading case of *Toomer v. Witsell,* 334 U.S. 385 (1948):

> The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation. "Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privileges with citizens of those States, the Republic should have constituted little more than a league of States; it would not have constituted the Union which now exists."

20. Story suggests the Clause was rewritten in the Constitution to avoid confusion among the terms "free inhabitants," "free citizens," and "people" which appear in the Articles of Confederation.

Id. at 395, 396 (quoting *Paul,* 75 U.S. (8 Wall.) at 180) (footnotes omitted).

In practice, one of the chief functions of the Clause is to prevent "taxation without representation," since those without a political voice provide an easy target for the revenue-ravenous legislator. The Court recognized this function explicitly in *Austin,* a case dealing with discriminatory state income taxes:

> Since nonresidents are not represented in the taxing State's legislative halls, judicial acquiescence in taxation schemes that burden them particularly would remit them to such redress as they could secure through their own State; but "to prevent [retaliation] was one of the chief ends sought to be accomplished by the adoption of the Constitution." Our prior cases, therefore, reflect an appropriately heightened concern for the integrity of the Privileges and Immunities Clause by erecting a standard of review substantially more rigorous than that applied to state tax distinctions among, say, forms of business organizations or different trades and professions.

420 U.S. at 662, 663 (quoting *Travis v. Yale & Towne Manufacturing Co.,* 252 U.S. 60 (1920) (citations omitted.)[21]

"Taxation without representation" is precisely the problem here: those moving to Vermont and seeking to register their cars are confronted with a tax about which they

21. For discussions of the Privileges and Immunities Clause as a proxy for equal political representation, see J. Ely, *Democracy and Distrust* (1980), and Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV,* 128 U. Pa. L. Rev. 379 (1979).

had no say and which residents in otherwise identical circumstances do not pay. In sum, Vermont's motor vehicle purchase and use tax is exactly the kind of tax the Privileges and Immunities Clause was intended to prohibit.

B. Vermont's Discriminatory Tax Scheme Violates Individual Rights Protected By The Privileges And Immunities Clause.

The first step in reviewing a discriminatory state statute under the privileges and immunities analysis set out in *Baldwin,* and reaffirmed last term in *United Building and Construction Trades Council v. City of Camden,* 104 S.Ct. 1020, 1027-1028 (1984),[22] is to determine if the individual right affected is in fact protected by the Clause. As suggested, this Court has had no difficulty applying the Clause to state tax laws which unfairly burden nonresidents. The best and most recent examples of these cases

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22. *United Building* remanded an appeal challenging a municipal ordinance requiring 40 percent of workers on city construction projects to be city residents. The fact that appellants in *United Building* were residents of the state negates any suggestion by the Court in *Zobel* that residents may never bring privileges and immunities challenges. *See Zobel,* 457 U.S. at 60, n. 5. As the Court emphasized in *United Building,* the important point was that the ordinance necessarily discriminated against those who were not New Jersey residents as well as those who were but did not live in Camden.

The same reasoning applies here, perhaps with even greater force. Although both appellants were state residents under Vt. Stat. Ann. tit. 23, § 4(30) when they sought to register their cars and triggered the tax, the same discriminatory tax would also apply to nonresidents registering cars in Vermont. More important, the discrimination occurred because appellants were not Vermont residents when they purchased their cars out-of-state. Thus, they were treated differently when they ventured to reside in Vermont, which is precisely the sort of discrimination the Privileges and Immunities Clause is meant to forbid. *See United Building,* 104 S.Ct. at 1027.

is *Austin.* There, the Court struck down a New Hampshire statutory scheme which imposed an income tax on Maine residents working in the state where no similar tax was levied on state residents. Like the tax at issue here, the New Hampshire statutory scheme imposed liability on both residents and nonresidents, but then exempted residents from payment. 420 U.S. at 658, 659. In rejecting the scheme, the *Austin* Court said:

> Against this background establishing a rule of substantial equality of treatment for the citizens of the taxing State and nonresident taxpayers, the New Hampshire Commuters Income Tax cannot be sustained. The overwhelming fact, as the State concedes, is that the tax falls exclusively on the income of nonresidents; and it is not offset even approximately by other taxes imposed upon residents alone. Rather, the argument advanced in favor of the tax is that the ultimate burden it imposes is "not more onerous in effect" on nonresidents because their total state tax liability is unchanged once the tax credit they received from their State of residence is taken into account. While this argument has an initial appeal, it cannot be squared with the underlying policy of comity to which the Privileges and Immunities Clause commits us.

420 U.S. at 656, 666 (quoting *Shaffer v. Carter,* 252 U.S. 37 (1920)) (citations omitted).

The Court has also struck down discriminatory tax laws on the basis of the Privileges and Immunities Clause in *Ward v. Maryland,* 79 U.S. (12 Wall.) 418 (1871), and *Travis v. Yale & Towne Manufacturing Co.,* 252 U.S. 60 (1920). In *Ward,* the court disallowed a statute charging nonresidents $300 annually to trade in goods not manufactured in Maryland, while residents paid only $12 to $150, depending on inventory. In *Travis,* another case involv-

ing exemptions, the Court held unconstitutional a New York statute which denied out-of-staters favorable income tax treatment given New Yorkers. 252 U.S. at 80, 81.[23]

C. Nonresidents Do Not Constitute A "Peculiar Source" Of Road Deterioration Sufficient To Justify A Discriminatory Tax Against Them.

Once the comity test established by *Baldwin* and *Austin* is met, a discriminatory state statute must be invalidated unless: 1) nonresidents constitute a "peculiar source" of the evil at which the statute is aimed, and 2) there is a substantial relationship between the statute and elimination of the evil. In view of this Court's decision in

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23. Vermont's discriminatory tax on automobiles also affects appellants' right to reside in the state of their choice, as discussed in Part I of this Memorandum; their right to hold personal property; and their right to pursue a livelihood. Each of these rights is protected by the Privileges and Immunities Clause, as Justice Washington made clear in the influential early case of *Corfield v. Coryell,* 16 F.Cas. 546, 552 (CCED Pa. 1825) (No. 3,320). Since *Corfield,* the Court has protected from discrimination based on residency the right of free ingress into a state, *Paul v. Virginia,* 75 U.S. (8 Wall.) 168 (1869) and the right to hold personal property, *Blake v. McClung,* 172 U.S. 239 (1898). In *Bell v. Burson,* 402 U.S. 535, 539 (1971), the Court recognized that use of one's automobile is frequently "essential in the pursuit of a livelihood." Since Vermont taxes such use unfairly, this case fits within a long line of decisions forbidding resident/nonresident discrimination which interferes with the right to pursue a livelihood. *United Building* (preference given to residents in municipal works jobs); *Toomer* (discriminatory shrimp boat license fee); *Mullaney v. Anderson,* 342 U.S. 415 (1952) (discriminatory commercial fishing license fee); *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948) (denial of commercial fishing permits to resident aliens); *Chalker v. Birmingham & Northwestern Railway Co.,* 249 U.S. 522 (1919) (discriminatory tax on rail construction); and *Ward* (discriminatory tax on sale of goods not manufactured locally).

Hicklin, the "peculiar source" argument cannot be seriously maintained on these facts.

Hicklin involved an Alaskan statute requiring residents to be hired for oil and gas work in preference to nonresidents.[24] The statute purportedly was enacted to combat Alaska's high unemployment rate. Assuming for the sake of argument that discrimination to fight unemployment was permissible under the Privileges and Immunities Clause, the *Hicklin* court nonetheless struck down the law because nonresidents had not been shown to be the "peculiar" source of unemployment:

> . . . certainly no showing was made on this record that nonresidents were "a peculiar source of the evil" Alaska Hire was enacted to remedy, namely, Alaska's "uniquely high unemployment." Alaska Stat. Ann. § 38.40.020 (1977). What evidence the record does contain indicates that the major cause of Alaska's high unemployment was not the influx of nonresidents seeking employment, but rather the fact that a substantial number of Alaska's jobless residents—especially the unemployed Eskimo and Indian residents—were unable to secure employment either because of their lack of education and job training or because of their geographical remoteness from job opportunities; and that the employment of nonresidents threatened to deny jobs to Alaska residents only to the extent that jobs for which untrained residents were being pre-

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24. As enacted, the statute required one year of residency in the state before any preference would be given. However, the Alaska Supreme Court struck down the durational residency requirement but still permitted preference on the basis of residency. Accordingly, the only question before the U.S. Supreme Court was discrimination between residents and nonresidents.

pared might be filled by nonresidents before the residents' training was completed.

437 U.S. at 526, 527 (footnotes omitted).[25]

Appellees in this case similarly cannot and have not argued that the use of Vermont highways by nonresidents who move to the state is a unique or even very significant cause of road deterioration. Use of the roads by those Vermont residents who do not pay tax, as well as by motorists passing through the state, by trucks, recreational vehicles, and resident cars, surely causes far more wear and tear than use by nonresidents who take up residence in Vermont. As is made clear in *Hicklin,* the fact that nonresidents may be *one* of many sources of the problem does not justify discriminatory treatment against them. *Id.*

III. Vermont's Motor Vehicle Purchase And Use Tax Scheme Violates The Commerce Clause Of The Federal Constitution.

Parts I and II of this Brief have argued that the residency discrimination manifest in Vermont's motor vehicle tax scheme violates the Equal Protection and Privileges and Immunities Clauses of the Constitution. Appellants believe that the tax also violates the Commerce Clause, even apart from that discrimination. The tax provides an illegal incentive for those planning to move to Vermont to wait and purchase their motor vehicles there. Both the purpose and effect of the tax cannot be squared with the Commerce Clause.

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25. The statute also failed to meet the "substantial relationship" test, since it was not closely tailored to aid the unemployed. See discussion at 437 U.S. 527, 528. In view of the failure of the "peculiar source" argument here, appellants believe the "substantial relationship" question need not be reached.

A. The Vermont Motor Vehicle Purchase And Use Tax Is Improperly Designed To Encourage Instate Motor Vehicle Purchases.

According to the Vermont Supreme Court, the Vermont Motor Vehicle Purchase and Use Tax has two purposes: to require users of Vermont's highways to "contribute toward their maintenance and improvement" and "to encourage residents to support the local economy by refusing to grant credit for taxes paid to any nonreciprocating state or province." *Leverson v. Conway,* 144 Vt. 523, 532-533, 481 A.2d 1029 (1984), J.A. 29-30. The tax also encourages nonresidents moving to Vermont to purchase a car in Vermont by refusing to grant them a tax credit. Such coercion violates the Commerce Clause.

Appellants agree that Vermont may charge users of its roads for maintenance and improvement costs. It could create toll roads or charge a higher flat annual vehicle registration fee or a higher annual registration fee based on the value of the vehicle. *Cf.* Cal. Rev. & Tax. Code §§ 10751-52 (West 1984). These alternatives would not violate the Commerce Clause because they would not induce individuals to buy their automobiles in Vermont rather than elsewhere.

What Vermont may not do is to impose a highway "user fee" as a means of illegally encouraging individuals to buy cars in Vermont. That point was made unmistakable last term in *Bacchus Imports, Ltd. v. Dias,* 52 U.S.L.W. 4979 (1984). *Bacchus* concerned a Hawaiian liquor tax which exempted *okolehao* (a native brandy) and fruit wine in order to encourage development of the local liquor industry. Applying a "strict rule of invalidity," 52 U.S.L.W. at 4981, this Court rejected the tax on Commerce Clause grounds. As it said:

> . . . [T]he legislation constitutes "economic protectionism" in every sense of the phrase. It has long been the law that States may not "build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Guy v. Baltimore,* 100 U.S. 434, 443 (1880). Were it otherwise, "the trade and business of the country [would be] at the mercy of local regulations, having for their object to secure exclusive benefits to the citizens and products of particular States." *Id.* at 442. It was to prohibit such a "multiplication of preferential trade areas" that the Commerce Clause was adopted. *Dean Milk Co. v. Madison,* 340 U.S. 349, 356 (1951).

52 U.S.L.W. at 4982. *See also Westinghouse Electric Corp. v. Tully,* 52 U.S.L.W. 4485, 4490 (1984) (rejecting state corporate franchise tax which imposed burdensome taxes on out-of-state transactions); *National Meat Association v. Deukmejian,* 743 F.2d 656, 659 (9th Cir. 1984) (protectionist measures employed by states subject to virtually per se rule of invalidity).

Vermont's motor vehicle tax suffers from the same infirmities as the taxes in *Bacchus* and *Westinghouse*. The selective denial of credits makes it more expensive for those affected to purchase outside Vermont. Because this result was a deliberate attempt to influence purchasing decisions in favor of Vermont businesses, a strict test of invalidity applies under the Commerce Clause and the tax should be stricken.

B. The Effect Of Vermont's Motor Vehicle Purchase And Use Tax Is To Discriminate Against Out-of-State Purchases In Violation Of The Commerce Clause.

This Court has never decided whether states imposing a use tax on personal property must also grant a credit against that tax for sales tax paid in other states. It is

undeniable that such a tax, if not fairly apportioned, acts as an economic barrier to the movement of goods from one state to another. By denying credit for sales tax paid other states, Vermont's one-time four percent motor vehicle use tax provides a considerable tax incentive for those in appellants' position to buy in Vermont.[26] Because Vermont's tax system would have a substantial impact on interstate commerce if applied by every other state, it does not meet the Commerce Clause tests under *Container Corp. of America v. Franchise Tax Board,* 103 S.Ct. 2933 (1983) or *Armco, Inc. v. Hardesty,* 52 U.S.L.W. 4787 (1984).[27]

1. Failure To Grant Sales Tax Credits Against An Unapportioned State Use Tax Violates The Underlying Purposes Of The Commerce Clause.

Courts and commentators alike have taken Justice Cardozo's opinion in *Henneford v. Silas Mason Co.,* 300

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26. By denying tax credit for sales tax paid to a "non-reciprocal" state, the tax also provides an incentive for Vermonters to purchase in "reciprocal" states or in Vermont itself. Because the states in which appellants purchased their cars are "reciprocal", the constitutionality of that provision is not addressed in this Brief. *Cf. Sporhase v. Nebraska ex rel. Douglas,* 458 U.S. 941 (1982); *Western and Southern Life Insurance Co. v. Board of Equalization,* 451 U.S. 648 (1981).

27. By granting credit for sales tax paid by residents on motor vehicle purchases in "reciprocal" states, the Vermont tax has less discriminatory effect than similar taxes that grant such credits to no one. *Cf. W. Va. Code* § 17A-3-4 (Supp. 1984). Nonetheless, it is not the quantum but the certainty of discrimination that determines whether a tax violates the Commerce Clause. "It is well settled that '[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.'" *Bacchus Imports,* 104 S.Ct. at 3055 (1984) (tax exemption for locally-produced alcoholic beverages constituting less than 1% of liquor sold in Hawaii violated Commerce Clause) (quoting from *Maryland v. Louisiana,* 451 U.S. 725, 760 (1981)).

U.S. 577 (1937), as a starting point in discussing the constitutional validity of use taxes which do not grant credit for sales tax paid other states. *Henneford* explicitly reserved the issue of whether such a credit was constitutionally required, since that issue was not before the Court.[28] The instant case squarely presents the question,

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28. The Washington use tax at issue in *Henneford* did have a credit. After noting that "[e]very one who has paid a use or sales tax anywhere, or, more accurately, in any state, is to that extent to be exempt from the payment of another tax in Washington," Justice Cardozo remarked at length upon the tax's "equality":

> When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. Equality exists when the chattel subject to the use tax is bought in another state and then carried into Washington. It exists when the imported chattel is shipped from the state of origin under an order received directly from the state of destination. In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local.

300 U.S. at 584.

Later in the opinion, however, Justice Cardozo was careful to note that the Court did not reach an issue not before it—whether a credit was constitutionally required:

> Yet a word of caution should be added here to avoid the chance of misconception. We have not meant to imply by anything said in this opinion that allowance of a credit for other taxes paid to Washington made it mandatory that there should be a like allowance for taxes paid to other states. A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere. If there are limits to that power, there is no need to mark them now. It will be time enough to

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however, since Vermont did not grant a compensating credit against its motor vehicle use tax to appellants for sales taxes paid New York and Illinois. Appellants believe that Vermont's motor vehicle use tax system conflicts with the purposes underlying the Commerce Clause, as well as the recent decisions of this Court in *Container Corp.* and *Armco.*

As Justice Cardozo recognized in *Henneford,* states in our federal system are, for many purposes, self-contained units. But one of the principal purposes behind the enactment of the Constitution was to end protective state tariffs—that is to say, to establish a nation in which the mobility of persons and goods would be entirely unaffected by excises imposed on goods simply because they were moved from one place to another. As the Court said in *Freeman v. Hewit,* 329 U.S. 249, 252 (1946): "the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but by its own force created an area of trade free from interference by the States . . ."

This Court has long recognized that the Commerce Clause does not countenance state taxes that expose interstate commerce to multiple burdens not borne by local commerce. *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 170 (1954). Accordingly, state taxes on

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> mark them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination. This statute by its framework avoids that possibility. The offsetting allowance has been conceded, whether the concession was necessary or not, and thus the system has been divested of any semblance of inequality or prejudice.

Id. at 577.

transactions or events having interstate elements must be fairly apportioned. This idea has received its fullest development in cases involving income, privilege, and gross receipts taxes. *E.g., Exxon Corp. v. Department of Revenue,* 447 U.S. 207 (1980); *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977); *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 255-57 (1938).

The same rules must be applied to use taxes.[29] Such a tax, when fairly apportioned to reflect *actual* use within a state, does not burden interstate commerce. For example, a highway user fee computed on some combination of factors reflecting value of the vehicle, miles driven, load borne, time spent within the state, or the like, would not create the danger that interstate commerce will be subjected to greater burdens than intrastate commerce. *Bode v. Barrett,* 344 U.S. 583 (1953), *aff'g* 412 Ill. 204, 106 N.E.2d 521 (1952) (annual license tax by weight of vehicle); *Capital Greyhound Lines v. Brice,* 339 U.S. 542, 546-47 (1950) (title fee based on value of vehicle, in conjunction with mileage charge); *Interstate Busses Corp. v. Blodgett,* 276 U.S. 245 (1928) (mileage tax on common carriers based on miles driven within state); *but cf. Sprout v. South Bend,* 277 U.S. 163, 169-70 (1928) (highway license fee disproportionate to use of roads struck down). A state may also levy a flat annual registration fee on all vehicles. *Hendrick v. Maryland,* 235 U.S. 610 (1915). The imposition of a use tax on an annual basis, rather than as a one-time levy, is itself a rough form of apportionment.

29. Because of the cumulative burden on interstate commerce, virtually every commentator to consider sales-and-use tax schemes without credit provisions has condemned them. *See* J. F. Due, *State and Local Sales Taxation* 250 (1971) ("Failure to allow credit creates gross discrimination against interstate commerce"); M. Cruz, *The Use Tax: Its History, Administration, and Economic Effects* 48, n. 32 (1941) and authorities there cited; Dane, *Movable property in interstate commerce,* 48 J. Taxation 176, 179-80 (1978); Comment, *Compensating Use Taxes,* 18 Ark L. Rev. 321, 328-29 (1964-65); Note, *Developments in the Law—Federal Limitations on State Taxation of Interstate Business,* 75 Harv. L. Rev. 953, 999 (1962); Note, *Economic Neutrality and the Compensating Use Tax,* 16 Stan. L. Rev. 1016 (1964). Even commentators who would permit use taxes without a corresponding credit for sales tax paid other states have admitted their deleterious economic effects. *See* Warren and Schlesinger, *Sales and Use Taxes: Interstate Commerce Pays Its Way,* 38 Colum. L. Rev. 49 (1938) (recognizing "clear economic authority showing that such [compensating use] taxes actually discriminate against interstate commerce").

But Vermont's motor vehicle tax is not fairly apportioned. It is instead a one-time levy in the amount of four percent of the value of the car. The tax does not give credit for similar levies already paid elsewhere, nor does it depend in any way on the amount of use that occurs in Vermont. As a result, Vermont's tax provides those in appellants' position with a considerable incentive to alter their car purchasing decisions. As will be demonstrated in the next section, such a tax system fails the Commerce Clause test recently outlined by this Court in *Container Corp.* and *Armco.*

2. Vermont's Motor Vehicle Purchase And Use Tax Fails To Meet The Commerce Clause Test Established By Armco, Inc. And Container Corp.

Last term, this Court reaffirmed its decision in *Container Corp.* that a state tax must be "internally consistent" to pass muster under the Commerce Clause. *Armco,*

Inc., 52 U.S.L.W. at 4789 (1984). Under *Container Corp.* and *Armco*, a state may only adopt a tax scheme which, *if adopted by every other state*, would not discriminate against interstate commerce. Vermont's motor vehicle tax fails that test.

Armco and *Container Corp.* afford a state some leeway to "frame its own system of burdens and exemptions without heeding systems elsewhere." *Henneford*, 300 U.S. at 587. For example, a state is free to impose a tax on sales, even though that tax might place producers in a second state, which had a manufacturing tax but no sales tax, at a competitive disadvantage in local markets. The sales tax would survive under *Armco* and *Container Corp.* because it would not burden interstate commerce if adopted by every other state.

Nevertheless, there are limits under the Commerce Clause to a state's taxing power, as the result in *Armco* itself demonstrates. There, the Court rejected a gross receipts tax, imposed by West Virginia on businesses selling tangible property at wholesale, which exempted local businesses. 52 U.S.L.W. at 4789. Plainly, such a tax would affect interstate commerce considerably if adopted by every other state in the Union, by making it more difficult for manufacturers to sell products outside of their home states.

Vermont's Motor Vehicle Purchase and Use Tax is similarly flawed. If every state imposed an unapportioned motor vehicle use tax without granting credit for sales tax paid elsewhere, the effect would be at least as significant as that in *Armco*. Every out-of-state motor vehicle purchase would be subject to double taxation, and

every interstate transfer of such property would trigger yet another substantial and unapportioned tax. Large, expensive mobile equipment, including automobiles, trucks, oil drilling rigs, construction equipment, and the like, could face use taxes of four, five, or six percent annually or even more frequently, depending how often such property moved across state lines. Owners of such equipment would face powerful incentives to alter their buying decisions for tax rather than valid economic concerns, just as appellants in this case faced an incentive to wait until they moved to Vermont to purchase their cars. Such economic distortions cannot be sanctioned under *Armco*.

CONCLUSION

Vermont's Motor Vehicle Purchase and Use Tax facially discriminates on the basis of residency in granting credit for sales taxes paid other states. Vermont imposes a tax on those who, like appellants, own automobiles and move to Vermont. Residents in otherwise identical circumstances avoid the tax.

Vermont's motor vehicle tax may be viewed from several legal perspectives. Because it is triggered when new residents first register automobiles purchased out of state, it discriminates against such individuals and in favor of older residents. That discrimination violates the Equal Protection Clause, since Vermont has no adequate justification for it.

The motor vehicle tax may also be analyzed under the Privileges and Immunities Clause, since only those who are nonresidents when they purchase their cars outside of

Vermont are required to pay it. The tax thus burdens a group with no political voice in Vermont, the very result the Clause was meant to forbid. There is no doubt that the Constitution protects nonresidents from unequal tax treatment unless they are a "peculiar source of the evil," an argument Vermont has not and cannot assert in this case.

Finally, the Vermont tax may be viewed in the context of interstate commerce. Because the tax was designed to and does provide an illegal incentive to purchase cars in Vermont, it cannot survive the proper "strict rule of invalidity" under the Commerce Clause. Further, because the motor vehicle tax is not fairly apportioned and does not provide a tax credit for those in appellants' position, it fails the Commerce Clause test set out in *Armco, Inc.* and *Container Corp.*

Accordingly, the opinion of the Vermont Supreme Court should be reversed and the motor vehicle use tax paid by appellants refunded.

Respectfully submitted,

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APPENDIX A

Vermont Motor Vehicle Registration Statutes

Vt. Stat. Ann. tit. 23, § 4. *Definitions.*

Except as may be otherwise provided herein, and unless the context otherwise requires in statutes relating to motor vehicles and enforcement of the law regulating vehicles, as provided in this title and part 5 of Title 20, the following definitions shall apply:

. . .

(30) "Resident" shall include all legal residents of this state and in addition thereto, any person who accepts employment or engages in a trade, profession or occupation in this state for a period of at least six months. Also in addition thereto, any foreign partnership, firm, association or corporation having a place of business in this state shall be deemed to be a resident as to all vehicles owned or leased and which are garaged or maintained in this state.

Vt. Stat. Ann. tit. 23 § 301. *Persons required to register.*

Residents as defined in section 4 of this title, except as provided in section 301a of this title, shall annually register motor vehicles owned or leased for a period of more than thirty days and operated by them, unless currently registered in Vermont. A person shall not operate a motor vehicle nor draw a trailer or semi-trailer on any highway unless such vehicle is registered as provided in this chapter.

APPENDIX B

State Use Tax Statutes

Twenty-five states provide credit against use tax for sales tax or use tax paid any other state, whether or not the state of prior taxation provides a reciprocal benefit:

Arizona, Ariz. Rev. Stat. Ann. § 42-1409(A) (2) (Supp. 1984).

Arkansas, Ark. Stat. Ann. § 84-4101 (1980) (Multistate Tax Compact, Art. V, § 1).

California, Cal. Rev. & Tax Code § 6406 (West 1970).

Colorado, Colo. Rev. Stat. § 39-26-203(1) (k) (1982).

Connecticut, Conn. Gen. Stat. § 12-430(5) (1983).

Delaware, Del. Code Ann. tit. 30, § 3002(a) (4) (1975) ("motor vehicle document fee") (credit available only if the vehicle was previously registered in another state and if the tax was paid within 90 days).

Florida, Fla. Stat. Ann. § 212.06(7) (West Supp. 1984).

Hawaii, Hawaii Rev. Stat. § 238-3(i) (Supp. 1983).

Idaho, Idaho Code § 63-3621(k) (Supp. 1984).

Illinois, Ill. Ann. Stat. ch. 120, 439.3(d) (Smith-Hurd 1984).

Iowa, Iowa Code § 423.25 (1971).

Kansas, Kan. Stat. Ann. §§ 79-3704(c), 79-3705 (1977).

Maine, Me. Rev. Stat. Ann. tit. 36, 1862 (1978).

Minnesota, Minn. Stat. Ann. § 297A.24 (West Supp. 1984).

Missouri, Mo. Ann. Stat. §§ 144.450 (Vernon 1976) (motor vehicles), 144.615(5) (Vernon 1976) (general use tax).

New Mexico, N.M. Stat. Ann. § 7-9-79A (1983).

Ohio, Ohio Rev. Code. Ann. § 5741.02(C) (5) (Page Supp. 1984).

Rhode Island, R.I. Gen. Laws § 44-18-30-A (1980).

Tennessee, Tenn. Code Ann. § 67-6-507(a) (Supp. 1984).

Utah, Utah Code Ann. § 59-16-4(h) (Supp. 1983).

Virginia, Va. Code § 58-441.9 (1974).

Washington, Wash. Rev. Code Ann. § 82.12.035 (1981).

Wisconsin, Wis. Stat. § 77.53(16) (1982).

Wyoming, Wyo. Tax Rep. (CCH) ¶61,406 at 6165-6168 (administrative interpretation).

Three states give credit against use tax for sales tax or use tax paid any other state, whether or not the state of prior taxation provides a reciprocal benefit, with respect to their general use taxes, but deny credit with respect to motor vehicles:

Indiana, Ind. Code §§ 6-2.5-3-5(a) (1984) (providing credit), 6-2.5-3-5(b) (1984) (denying credit with respect to motor vehicles).

Maryland, Md. Ann. Code art. 81, §375(c) (1980) (providing credit with respect to general use tax); Md. Transp. Code § 13-809 (1984) (no credit on motor vehicle excise tax).

Oklahoma, Okla. Stat. Ann. tit. 68, §§ 1404(c) (1966) (providing credit against general use tax), 2103 (Supp. 1984) (no credit against motor vehicle excise tax).

Fifteen states give credit against use tax for sales tax or use tax (or, in one case, only for sales tax) paid another state if the other state provides a reciprocal privilege:

Alabama, Ala. Code § 40-23-65 (1975).

Georgia, Ga. Code Ann. § 48-8-42 (1982).

Kentucky, Ky. Rev. Stat. Ann. §§ 139.510 (Baldwin 1984) (general use tax) (credit for sales tax only), 138.460(5) (Baldwin 1984) (motor vehicle usage tax).

Louisiana, La. Rev. Stat. Ann. tit. 47, § 303A (West 1970).

Massachusetts, Mass. Gen. Laws Ann. ch. 64I, § 7(c) (West Supp. 1984).

Michigan, Mich. Comp. Laws Ann. § 205.94(e) (West Supp. 1984).

Mississippi, Miss. Code Ann. § 27-67-7(a) (Supp. 1984) (credit available unless automobile or other property was first used in Mississippi).

Nebraska, Neb. Rev. Stat. § 77-2704(4) (Supp. 1983).

New Jersey, N.J. Stat. Ann. § 54:32B-11(6) (West Supp. 1984).

New York, N.Y. Tax Law § 1118(7)(a) (McKinney 1975).

North Carolina, N.C. Gen. Stat. § 105-164.6(4) (Supp. 1983).

North Dakota, N.D. Cent. Code § 57-40.2-11(1983).

Pennsylvania, Pa. Stat. Ann. tit. 72, § 7206 (Purdon Supp. 1984).

South Dakota, S.D. Codified Laws § 10-46-6.1 (1982).

Texas, Tex. Tax Code Ann. § 151.303(c) (Vernon 1982).

Vermont, 32 Vt. Stat. Ann. tit. 32, §§ 9744(a)(3) (1981) (general use tax), 8911(9) (1981) (motor vehicle purchase and use tax) (credit for residents only).

(3)

No. 84-592

In The

Supreme Court of the United States

October Term, 1984

NORMAN WILLIAMS and SUSAN LEVINE,

Appellants,

v.

STATE OF VERMONT and WILLIAM H. CONWAY, JR., COMMISSIONER, VERMONT DEPARTMENT OF MOTOR VEHICLES,

Appellees.

APPEAL FROM THE SUPREME COURT OF VERMONT

JOINT APPENDIX

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APPEAL DOCKETED OCTOBER 9, 1984
PROBABLE JURISDICTION NOTED
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12/23/82	Motion to Dismiss & Memorandum of Law in Support of Motion filed by Atty. Eschen;
01/21/83	Mo. to Intervene as a Plaintiff, Mo. to File Amended Complaint, Amended Complaint & Memorandum of Law in Opposition to Defts' Mo. to Dismiss filed by Atty. Williams;
01/26/83	Hearing on pending motions; Morse, Judge; Motion to Intervene-granted; Motion to Dismiss-under consideration; Atty. Eschen to have 10 days to respond; Plt. to have 3 days to file Supplemental response;
02/04/83	Reply Memorandum to Pltf's Memorandum of Law in Opposition to Deft's Mo. to Dismiss filed by Atty. Eschen;
02/18/83	Memorandum in Reply to Defts' Supplemental and Reply Memorandum filed by Atty. Williams;
02/24/83	Opinion and Order filed; Copies mailed to counsel 2/25/83; The Motion to Dismiss filed by the Defendants is GRANTED;
03/22/83	Notice of Appeal dated March 21, 1983 filed by Atty. Williams.

Vermont Supreme Court
Docket No. 83-139

05/27/83	Printed case and appellant's brief filed by Atty. Williams.
07/21/83	Appellee's brief filed by Atty. Eschen.
07/28/83	Appellant's reply brief filed by Atty. Williams.

02/28/84 HEARD WITH FULL COURT: Atty's. Norman Williams and Andrew Eschen argued.

06/15/84 *ENTRY ORDER:* This case being controlled by our decision in *Leverson v. Conway,* — Vt. —, — A.2d —, filed this same date, the judgment below is affirmed. Copy of EO [Entry Order] and OP [Opinion] (Leverson v. Conway) mailed to Norman Williams, Esq. & Susan Levine and Andrew M. Eschen, Esq.

06/28/84 Motion for extension of time and motion for reargument filed by Atty. Williams.

07/09/84 *ENTRY ORDER:* Plaintiffs' motion for reargument is denied. cc of EO mailed to Mr. Williams and Atty. Eschen and trial court.

07/26/84 Notice of appeal to U.S. Supreme Court filed by Atty. Williams. Forwarded to Washington Superior Court.

12/12/84 Notice from U.S. Supreme Court advising "The statement of jurisdiction in this case having been submitted and considered by the Court, in the case probable jurisdiction is noted." Order sent on to Washington Superior Court.

STATE OF VERMONT
WASHINGTON COUNTY, SS

WASHINGTON SUPERIOR COURT

NORMAN WILLIAMS

v.

STATE OF VERMONT AND
WILLIAM H. CONWAY, JR., ET AL.

MOTION TO DISMISS

NOW COMES the State of Vermont and William H. Conway, Jr., et al., and by and through Assistant Attorney General Andrew M. Eschen hereby moves this Honorable Court pursuant to V.R.C.P. 12(b)(6) to dismiss the above-captioned matter for the following reasons:

(1) Plaintiff lacks standing.

(2) The Complaint fails to state a claim upon which relief can be granted.

In support hereof, Defendant respectfully submits his Memorandum of Law, attached hereto and incorporated herein by reference.

Dated at Montpelier, Vermont this 22 day of December, 1982.

JOHN J. EASTON, JR.
ATTORNEY GENERAL

By: /s/ Andrew M. Eschen
Andrew M. Eschen
Assistant Attorney
General

STATE OF VERMONT
WASHINGTON COUNTY, SS.

WASHINGTON SUPERIOR COURT
DOCKET NO. S-436-82 Wnc

NORMAN WILLIAMS and SUSAN LEVINE,

Plaintiffs,

v.

STATE OF VERMONT and
WILLIAM H. CONWAY, JR., VERMONT
COMMISSIONER OF MOTOR VEHICLES,

Defendants.

AMENDED COMPLAINT

Norman Williams, pro se, and Susan Levine, by her attorneys, Gravel, Shea & Wright, Ltd., complain of the Defendants and allege as follows:

PRELIMINARY STATEMENT

1. This action is brought by the Plaintiffs to prevent deprivation under the color of Vermont law of certain rights, privileges and immunities secured to the Plaintiffs by the Constitutions of the United States and the State of Vermont. The action seeks a judgment ordering that the "purchase and use tax" paid by Plaintiffs under Sections 8903 and 8911 of Title 32, Vermont Statutes Annotated, be refunded and declaring that such sections are unconstitutional, both in general and as applied to Plaintiffs on the particular facts of this case.

2. This action is brought pursuant to 42 U.S.C. §§1983 and 1988. The relief sought is mandated by *Austin v. New Hampshire,* 420 U.S. 656 (1975), and *Baldwin v. Fish & Game Commission,* 436 U.S. 371 (1978).

PARTIES

3. Plaintiff Norman Williams is a Vermont resident who moved to Vermont from Illinois on February 1, 1981. Plaintiff Williams has worked in Vermont since February 1, 1981, and thus qualifies as a resident for purposes of 32 V.S.A. §8902(2) and 23 V.S.A. §4(30).

4. Plaintiff Susan Levine is a Vermont resident who moved to Vermont from New York in November, 1979. Plaintiff has worked in Vermont since November, 1979, and thus qualifies as a resident for purposes of 32 V.S.A. §8902(2) and 23 V.S.A. §4(30).

5. Defendant William H. Conway, Jr., is Commissioner of the Department of Motor Vehicles for the State of Vermont. Defendant Conway is authorized under 32 V.S.A. §8901 to administer the Motor Vehicle Purchase and Use Tax imposed by 32 V.S.A. §8903 and under 32 V.S.A. §8909 to suspend the right to operate a motor vehicle in the event such tax is not paid.

FACTUAL ALLEGATIONS

Norman Williams

6. Plaintiff Williams purchased a 1980 Volkswagen Dasher Diesel on December 10, 1980, for Nine Thousand Three Hundred Dollars ($9,300.00) from Cole Volkswagen in Chicago Heights, Illinois. At the time of the purchase, Plaintiff Williams paid a five percent (5%) Illinois sales tax, or $465.00.

7. Plaintiff Williams' Illinois registration expired on September 30, 1981. As a resident of Vermont under the terms of 23 V.S.A. §4(30), Plaintiff Williams was then

immediately required to register his motor vehicle in Vermont by operation of 23 V.S.A. §301.

8. Plaintiff Williams presented his completed Registration Tax and Title Application to Thomas McCormick of the Vermont Department of Motor Vehicles on October 22, 1981, but declined to pay the registration tax on grounds that such tax was unconstitutional.

9. Without payment of the Motor Vehicle Registration and Use Tax, the Department of Motor Vehicles and the Defendant Conway refused vehicle registration.

10. On November 3, 1981, Plaintiff Williams instituted an action in Vermont Federal District Court for a declaratory judgment that 32 V.S.A. §§8903, 8909, and 8911 are unconstitutional and void.

11. On June 30, 1982, following the Supreme Court's decision in *California v. Grace Brethren Church,* 50 U.S. L.W. 4703 (June 18, 1982), the action referred to in paragraph 9 was dismissed on jurisdictional grounds under the Tax Injunction Act, 28 U.S.C. §1341.

12. On August 27, 1982, Plaintiff Williams again presented a completed Registration Tax and Title Application to the Vermont Department of Motor Vehicles.

13. Based on an estimated market value of $4,300, the Vermont Department of Motor Vehicles assessed a "purchase and use tax" of $172 on the Plaintiff Williams' automobile.

14. Plaintiff Williams paid the "purchase and use tax" assessed by check dated August 27, 1982.

15. On August 27, 1982, Plaintiff Williams also requested a hearing for refund on the grounds the "purchase

and use tax" is unconstitutional, which hearing was granted by the Department of Motor Vehicles on October 12, 1982.

16. By a memorandum dated October 26, 1982, the Department of Motor Vehicles refused to refund the "purchase and use" tax paid by Plaintiff Williams.

Susan Levine

17. Plaintiff Susan Levine purchased a 1979 Chrysler Horizon on September 29, 1978, for Four Thousand Nine Hundred Twenty-three Dollars and Forty Cents ($4,923.40) from Upstate Auto Service and Body Works, Inc. in Saranac Lake, New York. At the time of purchase, Plaintiff Levine paid a seven percent (7%) New York sales tax, or Three Hundred Forty-four Dollars and Sixty-four Cents ($344.64).

18. Plaintiff Levine's New York registration will expire on February 28, 1983. As a resident of Vermont under the terms of 23 V.S.A. §4(30), Plaintiff Levine will be required to register her motor vehicle in Vermont by operation of 23 V.S.A. §301.

19. On December 16, 1982, Plaintiff Levine presented a completed Registraton Tax and Title Application to the Vermont Department of Motor Vehicles.

20. Based on an estimated market value of Two Thousand Seven Hundred Fifty Dollars ($2,750), the Vermont Department of Motor Vehicles assessed a "purchase and use tax" of One Hundred Ten Dollars ($110) on Plaintiff Levine's automobile.

21. Plaintiff Levine paid the "purchase and use tax" assessed by check dated December 16, 1982.

LEGAL CLAIMS

22. Section 8903(b) of Title 32 imposes a tax of four percent of the taxable cost of a motor vehicle, or $600, whichever is smaller, at the time such motor vehicle is first registered in Vermont. "Taxable cost" is defined at 32 V.S.A. §8902(5) with respect to one-owner cars as the "purchase price of a motor vehicle," but the Vermont Motor Vehicle Department, as a matter of policy, imposes tax only on the market value of the car at registration.

23. Section 8911(9) of Title 32 exempts from the registration tax "pleasure cars acquired outside the state by a *resident of Vermont* on which a state sales or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances." (Emphasis added).

24. The states of Illinois and New York, in which Plaintiffs acquired their cars, do grant pro-rata credit for Vermont taxes so as to qualify under the §8911(9) exemption. Thirty-five of the fifty states grant such credit.

25. Plaintiffs and other persons moving into Vermont and acquiring resident status under 23 V.S.A. §4 are required to register their cars by 23 V.S.A. §301 and to pay registration tax by 32 V.S.A. §8903, even though a similar tax has already been paid in another state. Individuals not complying with 23 V.S.A. §301 or 32 V.S.A. §8903 face suspension of driving privileges under 32 V.S.A. §8909.

26. The imposition of the Motor Vehicle Purchase and Use Tax under 32 V.S.A. §§8903(b) and 8911(9) on non-residents but not residents purchasing pleasure cars outside the state violates privileges and immunities to which Plaintiffs are entitled under Article IV, Section 2 of the United States Constitution.

27. Imposition of the Motor Vehicle Purchase and Use Tax under 32 V.S.A. §§8903(b) and 8911(9) on non-residents but not residents purchasing pleasure cars outside the state violates Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and under the Proportional Contribution Clause of the Vermont Constitution.

28. Imposition of the Motor Vehicle Purchase and Use Tax under 32 V.S.A. §§8903(b) and 8911(9) on non-residents but not residents purchasing pleasure cars outside the state violates Plaintiffs' right under the Commerce Clause of the United States Constitution, Art. I, §8, Cl.3, by unlawfully discriminating against purchases by non-residents.

RELIEF

WHEREFORE, Plaintiffs pray that judgment be entered:

1. Declaring that 32 V.S.A. §§8903(b), 8909, and 8911 are unconstitutional and void insofar as they impose a registration fee and license suspension penalty on Plaintiffs by reason of their non-resident status which would not be imposed on Vermont residents in the same circumstances;

2. Ordering the Defendant Department of Motor Vehicles to refund the purchase and use tax of $172 paid by Plaintiff Williams and the $110 paid by Plaintiff Levine in this case; and

3. Granting Plaintiffs such other relief as the court may deem just, proper, and equitable, including costs and reasonable attorneys' fees as authorized by 42 U.S.C. §1988.

Dated: Burlington, Vermont
January 20, 1983

The Plaintiffs

/s/ Norman Williams
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Pro Se and Attorney for
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STATE OF VERMONT
WASHINGTON COUNTY, SS.

WASHINGTON SUPERIOR COURT
DOCKET NO. S436-82WnC

NORMAN WILLIAMS and SUSAN LEVINE

v.

STATE OF VERMONT and
WILLIAM H. CONWAY, JR.

OPINION AND ORDER

The above-entitled cause came before the Washington Superior Court on the Motion to Dismiss filed by Defendants. Plaintiffs seek a declaratory judgment that 32 V.S.A. §8903 and §8911 are unconstitutional and refund of the use tax they have paid.

Plaintiffs purchased their motor vehicles out-of-state prior to the time they became residents of Vermont and paid sales tax to the states where the purchases were made, Williams in Illinois and Levine in New York. Both Plaintiffs subsequently moved to Vermont and paid, under protest, a Vermont use tax on the present fair market value of their vehicles. In this action, they maintain that the imposition of a use tax without an offsetting credit for the sales tax they paid to another state violates the Privileges and Immunities, the Equal Protection and the Commerce Clauses of the United States Constitution, and the Proportional Contribution Clause of the Vermont Constitution.

32 V.S.A. §8903 imposes a sales tax of 4% of the taxable costs of the vehicle or $600, whichever is less, upon all motor vehicles purchased by residents of Vermont.

Subsection (b) of that provision imposes a corollary use tax of the same amount which is triggered by the registration or transfer of registration of a vehicle. A use tax need not be paid if a Vermont sales tax has been paid. In addition, 32 V.S.A. §8911 provides a further exception to the use tax for:

> (9) pleasure cars acquired outside the state by a resident of Vermont on which a state sales tax or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another state is less than the Vermont tax the tax due shall be the difference.

A similar provision which applied to pleasure cars acquired outside the state by nonresidents was repealed in 1979.

Under this statutory scheme, a Vermont resident who purchases a motor vehicle out-of-state is credited for sales tax paid in the state of purchase when the Vermont use tax is imposed. A nonresident who purchases a car out-of-state and subsequently registers his car in Vermont is not granted such a credit. This distinction, Plaintiffs maintain, violates their constitutional rights.

All states which impose a sales tax also impose a complementing use tax on tangible property acquired outside of the state. This measure is intended to protect sales tax revenues by placing in-state retailers on a competitive parity with out-of-state retailers exempt from the local sales tax. *National Geographic v. California Equalization Board,* 430 U.S. 551, 555 (1977). The power of the states to establish a nondiscriminatory tax on the use of goods brought from another state has been firmly established. *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1938).

The Washington use tax statute construed by the Court in *Henneford* provided an offsetting credit available to residents and nonresidents alike if any tax had been paid to another state by reason of use or purchase there. *Id.* at 584. The Court cautioned, however, that

> [w]e have not meant to imply by anything said in this opinion that allowance of a credit for other taxes paid to Washington made it mandatory that there should be a like allowance for taxes paid to other states. A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere. If there are limits to that power, there is no need to mark them now. It will be time enough to mark them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination.

Id. at 587. And, in a later decision, the Supreme Court declined to rule on the constitutional necessity of an offset in the absence of evidence that the taxpayer had paid a sales tax in the state of origin. *Southern Pacific Co. v. Gallagher,* 305 U.S. 167 (1939).

The practice of granting a credit for sales tax has been adopted by a majority of the states which impose a use tax on out-of-state purchases. 68 Am.Jur.2d *Sales and Use Taxes* §220. Vermont, like most, provides for such a credit for purchases by residents. The sole issue before the Court, therefore, is whether the legislature's failure to provide a similar credit for nonresidents constitutes discrimination of constitutional dimensions.

The mandate of *Halliburton Oil Well Cementing Co. v. Reilly,* 373 U.S. 64, 70 (1963), is that "equal treatment for in-state and out-of-state taxpayers similarly situated is a condition precedent for a valid use tax on goods im-

ported from out-of-state." Equality of treatment refers to what happens within the taxing state, and not to the entire tax burden imposed on a particular taxpayer.

If a difference in treatment exists, the Court must impose "only the minimum scrutiny of the so-called 'rational basis test'." *Hadwen, Inc. v. Dept. of Taxes,* 139 Vt. 37, 42, 422 A.2d 255 (1980). Classification is unconstitutional only when similar people are treated differently for wholly arbitrary and capricious reasons. *Id.* Where the classification rests on "some reasonable consideration of legislative policy, it is not unconstitutional." *Andrews v. Lathrop,* 132 Vt. 256, 259, 315 A.2d 860 (1974).

> [The] equal protection [clause] does not require identity of treatment with respect to classification for tax purposes, but only that the classification or distinction rest on a real, unfeigned difference; have some relevance to the legislative purpose; and lead to a difference in treatment which is not so disparate as to be wholly arbitrary.

Vermont Motor Inns, Inc. v. Town of Hartford, 134 Vt. 52, 55, 350 A.2d 369 (1975).

We are persuaded that 32 V.S.A. §8911 does not afford, on its face, equal treatment to residents and nonresidents who purchase cars out-of-state. We conclude, however, that this disparity is supported by a rational purpose and is reasonably structured to advance a legitimate legislative goal.

We take as a logical starting point the premise that Vermont has the right to impose a sales or use tax on all motor vehicles purchased or used within the state. In fact, however, neither Vermont, New York or Illinois imposes a sales tax on vehicles sold to nonresidents. To

that extent, the reciprocal credit provision of 32 V.S.A. §8911 is inapplicable, since a Vermont resident buying a car in New York or Illinois would not have paid a sales tax, and would thus be liable for the entire amount of use tax in Vermont.

Vermont taxes only sales made to Vermont residents, whether in the guise of a sales tax (if purchased in-state) or a use tax (if purchased out-of-state). Whatever the tax is called, it is imposed only once—by the state of consumption. When a motor vehicle is used in more than one state, however, it is reasonable to subject it to a use tax in each state. Were it otherwise, a Vermont use tax might be avoided altogether "by the simple expedient of buying and using the property outside the [state] for a period sufficiently long to avoid the imposition of such a tax." *Atlantic Gulf & Pac. Co. v. Gerosa,* 16 N.Y.2d 1, 209 N.E.2d 86, 89 (1965). It is important to note, moreover, that the use tax imposed upon Plaintiffs is not upon the original price of the motor vehicles, but only on their value at the time they were brought into the state.

While the overall tax burden on the Plaintiffs may be greater than on a state resident who does not move, we are persuaded that this difference is supported by their use of the highways of more than one state. In any event, the test for an equal protection claim is whether discrimination occurs within the state, and we find that it does not. The state exacts a use tax upon the value of all cars used *within* the state, regardless of whether they were purchased by residents or nonresidents, and Plaintiffs have failed to demonstrate that they would have been treated any differently had they been Vermont residents when they purchased their cars.

Plaintiffs have also failed to show any infringement of their right to travel freely between states. They, like Vermont residents, have merely been compelled to pay for the privilege of using Vermont highways.

The test of whether a statute infringes on the right of free interstate travel is whether it "has no other purpose than to chill the assertion of constitutional rights by penalizing those who choose to exercise them." *Place v. Place,* 129 Vt. 326, 328, 278 A.2d 710 (1971), citing *Shapiro v. Thompson,* 394 U.S. 618 (1969). Clearly, not every differential between states can be said to violate the fundamental right to travel.

Unlike *Shapiro,* the regulation in question does not inflict a severe penalty or have "dire effects". See *Starns v. Malkerson,* 401 U.S. 985 (1971), aff'g without opinion 326 F.Supp. 234 (D. Minn. 1970). As one commentator has stated, "[right to travel] cases may . . . be understood more readily as revolving about the issues of welfare and poverty and not truly about the fundamental right to travel." L.Tribe, *American Constitutional Law* 1005. We are persuaded that the denial of welfare benefits or emergency medical relief for a year, or an extended residency requirement in order to vote, offer a very different kind of impediment to travel between states than does the very minimal monetary outlay compelled by 32 V.S.A. §8903. The imposition of a use tax on vehicles purchased out-of-state does not impede the right to travel, even in the absence of a credit for previously paid sales tax.

Nor is the Court persuaded that Vermont's use tax violates the Privileges and Immunities Clause of the United

States Constitution. 68 Am.Jur. 2d *Sales and Use Taxes* §197; *State v. Fields,* 27 Ohio L.Abs, 662, 35 N.E.2d (1938). To support a claim that a taxing statute abridges constitutional privileges and immunities, Plaintiffs must demonstrate that they are treated differently from state citizens without a reasonable basis. *Wheeler v. State,* 127 Vt. 361, 366, 249 A.2d 887 (1969), citing *Travis v. Yale & Towne Mfg. Co.,* 252 U.S. 60, 79. Since we have concluded that the difference in treatment afforded residents and nonresidents, if any, has a reasonable basis, we conclude that Plaintiffs have failed to demonstrate that the statutes in question violate the Privileges and Immunities Clause of the constitution.

With respect to Plaintiffs' claim regarding a violation of the Commerce Clause, we conclude that no discrimination against interstate commerce has been demonstrated. The Vermont use tax statutes do not discourage purchases from out-of-state retailers, or benefit in-state retailers at another state's expense. At most, assuming that the nonresident knew at the time of purchase that he intended to establish residency in Vermont, the statutes would furnish an incentive to move prior to the acquisition of an out-of-state motor vehicle.

The Proportional Contribution Clause of the Vermont Constitution has been construed by the Court as the practical equivalent of the Equal Protection Clause of the federal constitution. *Pabst v. Commissioner of Taxes,* 136 Vt. 126, 388 A.2d 1181 (1978). For the same reasons the Court found no infringement of the Fourteenth Amendment, therefore, we conclude that Plaintiffs have failed

to demonstrate that the Proportional Contribution Clause has been violated.

In view of the foregoing, it is hereby ORDERED AND ADJUDGED:

The Motion to Dismiss filed by the defendants is GRANTED.

Dated at Montpelier, Vermont this 24th day of February, 1983.

/s/ James L. Morse
James L. Morse
Superior Judge

/s/ Willis C. Bragg
Willis C. Bragg

/s/ Patricia B. Jensen
Patricia B. Jensen

STATE OF VERMONT
WASHINGTON COUNTY, SS.

WASHINGTON SUPERIOR COURT

Docket No. S-436-82Wnc

NORMAN WILLIAMS and SUSAN LEVINE,

Plaintiffs,

v.

STATE OF VERMONT AND
WILLIAM H. CONWAY, JR., Vermont Commissioner
Of Motor Vehicles,

Defendants.

NOTICE OF APPEAL
(Filed March 22, 1983)

Notice is given that Norman Williams and Susan Levine, Plaintiffs in the above case, hereby appeal to the Supreme Court from the Opinion and Ordered entered in this action on February 24, 1983.

Dated: Burlington, Vermont
March 21, 1983

THE APPELLANTS

By: /s/ Norman Williams
Norman Williams, Esq.
Pro Se and Attorney
for Susan Levine
Gravel, Shea & Wright,
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VERMONT SUPREME COURT

ENTRY ORDER

SUPREME COURT DOCKET NO. 83-139

June Term, 1984

NORMAN WILLIAMS, Esq. and SUSAN LEVINE

v.

STATE OF VERMONT;
WILLIAM H. CONWAY, JR.,
COMMISSIONER OF MOTOR VEHICLES

APPEALED FROM: Washington Superior Court

Docket No. S-436-82Wnc
(Filed June 15, 1984)

In the above entitled cause
the Clerk will enter:

Ths case being controlled by our decision in *Leverson v. Conway*, — Vt. —, — A.2d —, filed this same date, the judgment below is affirmed

BY THE COURT:

/s/ Franklin S. Billings, Jr.
Chief Justice

/s/ William C. Hll

/s/ Wynn Underwood

/s/ Louis P. Peck

/s/ Ernest W. Gibson III
Associate Justices

No. 83-157

SUPREME COURT

ON APPEAL FROM DISTRICT COURT OF VERMONT,
UNIT NO. 1, RUTLAND CIRCUIT

LEONARD G. LEVERSON

v.

WILLIAM H. CONWAY,
VERMONT DEPARTMENT OF MOTOR VEHICLES

November Term, 1983

Francis B. McCaffrey, J.
Leonard G. Leverson, pro se, Pittsford, plaintiff-appellant
John J. Easton, Jr., Attorney-General, and Andrew M. Eschen, Assistant Attorney General, Montpelier, for defendant-appellee

PRESENT: Billings, C.J., Hill, Underwood, Peck and Gibson, JJ.

GIBSON, J. On May 29, 1982, while residing in Wisconsin, plaintiff purchased a 1979 Subaru station wagon for the sum of $4325. He paid a five percent sales tax of $216.25 to the state of Wisconsin. In July 1982 plaintiff moved to Vermont. Upon registering his vehicle in Vermont in August 1982, plaintiff was required to pay a use tax of $112 as a condition of registration. The use tax, computed at the rate of four percent on a low book value of $2800 as of the date of registration was paid by plaintiff under protest. Subsequently, plaintiff brought suit to recover the $112. The matter was submitted to the small claims court on an agreed statement of facts. Upon the entry of judgment for defendant, plaintiff appealed, presenting the following issues for our consideration.

(1) Whether the Vermont motor vehicle purchase and use tax (32 V.S.A. § 8901 et seq.) violates the Equal Protection Clause of the Fourteenth Amend-

ment to the United States Constitution by its failure to afford to a new resident credit for the sales tax paid on an automobile purchased, used, and registered in a former state of residence;

(2) Whether the Vermont motor vehicle purchase and use tax violates the Proportional Contribution Clause (Ch. I, Art. 9) of the Vermont Constitution by its failure to afford to a new resident credit for the sales tax paid on an automobile purchased, used, and registered in a former state of residence;

(3) Whether the Vermont motor vehicle purchase and use tax violates the Privileges and Immunities Clause of Article IV, § 2, cl. 1 of the United States Constitution by its failure to afford to a new resident credit for the sales tax paid on an automobile purchased, used, and registered in a former state of residence; and

(4) Whether the Vermont motor vehicle purchase and use tax violates the Commerce Clause (Art. I, § 8, cl. 3) of the United States Constitution by its failure to afford to a new resident credit for the sales tax paid on an automobile purchased, used, and registered in a former state of residence.

32 V.S.A. § 8903 imposes a tax of four percent, or $600, whichever is smaller, upon the purchase and use of motor vehicles within the State of Vermont. The tax is payable by residents of the state at the time of purchase, *id.* § 8903(a), or, if the vehicle is purchased out-of-state, at the time the vehicle is first registered for use within the state. *Id.* § 8903(b).

Residents who purchase pleasure cars outside the state and pay a sales or use tax to another state are exempt from paying a use tax to the State of Vermont, at least to the extent of the tax paid the other state, providing the state of purchase has a reciprocal agreement with Ver-

mont that grants a similar credit for Vermont tax paid under similar circumstances. *Id.* § 8911(9).

Until recently, a nonresident who purchased, registered and used his pleasure car in another state for at least thirty days was also granted an exemption; however, that exemption was repealed effective September 1, 1980. 1979 No. 202 (Adj. Sess.), § 3, Pt. VI, eff. Sept. 1, 1980 (repealing 32 V.S.A. § 8911(6)). As a result of the repeal, a nonresident who moves to Vermont and desires to register his motor vehicle here must pay the State of Vermont a use tax of four percent of the fair market value of his vehicle as of the time of registration. Although Wisconsin is a state that has a reciprocal agreement with the State of Vermont, the plaintiff, as a person who purchased his vehicle while a resident of Wisconsin and registered and used it in that state for more than thirty days, is not entitled to an exemption in light of the 1980 repeal.

The purpose of the motor vehicle purchase and use tax is to pay for improvement and maintenance of the state and interstate highway systems. 32 V.S.A. § 8901. The use tax, an important complement to the sale [sic] tax, is designed "to protect a state's revenues by taking away the advantages to residents of traveling out of state to make untaxed purchases, and to protect local merchants from out-of-state competition which, because of its lower or nonexistent tax burdens, can offer lower prices." *Rowe-Genereux, Inc. v. Department of Taxes,* 138 Vt. 130, 133-34, 411 A.2d 1345, 1347 (1980). The power of a state to establish a nondiscriminatory tax on the user of goods brought from another state has long been firmly established. *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1937).

Sales and use taxes are different in concept, and they are assessed upon different transactions.

> A sales tax is a tax upon the freedom to purchase .... A use tax is on the enjoyment of that which was purchased .... Though sales and use taxes may secure the same revenues and serve the same complementary purposes, they are .... taxes on different transactions and for different opportunities afforded by a State.

McLeod v. Dilworth, 322 U.S. 327, 330-31 (1944). Because the taxes are intended to complement one another, a person who has paid a tax upon the purchase of a motor vehicle in Vermont is not subject to the payment of a use tax to the state. 32 V.S.A. § 8903(b).

We first consider whether Vermont's motor vehicle purchase and use tax violates the Equal Protection Clause. Plaintiff claims that the use tax adversely affects his right to travel and that any infringement of this fundamental right must be viewed with "strict scrutiny" by the courts. The right to travel has been recognized by the United States Supreme Court as a right that "protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents." *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982) (citing *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974)). See also *Memorial Hospital v. Maricopa County, supra,* (one-year county residency requirement for nonemergency medical benefits struck down as penalizing exercise of right to travel without the showing of a sufficient state interest in justification); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (one-year residency requirement to vote in state election rejected on ground that no compelling state interest was shown to justify the penalty imposed as a result of the exercise of

the right to travel); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (one-year residency requirement to qualify for welfare benefits struck down on ground that no compelling governmental interest had been shown in justification of the state action penalizing the exercise of the right to travel).

The "strict scrutiny" test is invoked upon a showing of some penalty resulting from the exercise of a faundamental right, such as the right to travel; there is no requirement of a showing that a person was deterred from traveling, only that there was a penalty for doing so. *Dunn v. Blumstein, supra,* 405 U.S. at 340. Under the strict scrutiny test, "any classification which serves to penalize the exercise of .... [a fundamental] right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." *Shapiro v. Thompson, supra,* 394 U.S. at 634 (emphasis in original).

Ordinarily, when this Court is called upon to determine whether a tax law violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, the Court is required to impose "only the minimum scrutiny of the so-called 'rational basis test'." *Hadwen, Inc. v. Department of Taxes,* 139 Vt. 37, 42, 422 A.2d 255, 258 (1980). See *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 527 (1959). "This test ... permits a determination of unconstitutionality only where the relevant law classifies similar persons for different treatment upon wholly arbitrary and capricious grounds .... Where the classification rests upon 'some reasonable consideration of legislative policy,' it will not be found unconstitutional." *Hadwen, Inc. v. Department of Taxes, supra,* 139 Vt. at 42, 422 A.2d at 258-59 (citing *Andrews v. Lathrop,*

132 Vt. 256, 259, 315 A.2d 860, 862 (1974)); *Allied Stores of Ohio, Inc. v. Bowers, supra,* 358 U.S. at 527.

Plaintiff complains that the court below erroneously used the "rational basis" test, applying an insufficient standard to his complaint, and that had the "strict scrutiny" test been applied, the use tax, which plaintiff paid under protest, would have been declared an unconstitutional infringement of plaintiff's right to travel under the Equal Protection Clause, entitling plaintiff to recover the $112 he paid to the state.

Plaintiff misconceives the nature of the right he seeks to invoke. His right to travel has not been infringed. He suffered no restrictions on his right to travel to Vermont and incurred no penalty as a result of the exercise of this right. He was free to bring his property, including his station wagon, to Vermont without incurring any penalty as a result. He was free to move about the state in public or private conveyance (other than the station wagon) without restriction or penalty, and he was free to obtain a Vermont driver's license without having to pay any use tax on his vehicle. Only when plaintiff sought the privilege of operating that vehicle on Vermont's highways was he required to register it; registration, not the move to Vermont, triggered the use tax obligation. Had plaintiff not sought to register the vehicle, he would have been under no obligation to pay a use tax on it.

In *Wells v. Malloy,* 402 F. Supp. 856 (D. Vt. 1975), affirmed without opinion 538 F.2d 317 (2d Cir. 1976), the plaintiffs challenged the constitutionality of the statute providing for suspension of their right to drive following nonpayment of the automobile purchase and use tax. Rejecting plaintiffs' claim, the court held, "[a]lthough a driver's license is an important property right in this age of the automobile, it does not follow that the right to drive is fundamental in the constitutional sense." *Id.* at 858. Accord *Montgomery v. North Carolina Dept. of Motor Vehicles,* 455 F. Supp. 338, 342 (W.D.N.C. 1978) (revocation of driver's license for refusal to submit to chemical tests does not deprive licensee of any fundamental constitutional right).

As was stated in *Wells v. Malloy, supra,* 402 F. Supp. at 859,

> 'Vermont may no longer be thought of as having only dirt roads and an inadequate transportation and highway system.' (quoting *Miller v. Malloy,* 343 F. Supp. 46, 50 (D. Vt. 1972)). It is certainly possible to get from place to place using public transportation or by taking advantage of friends or family members.

In analyzing the argument that suspension of the right to drive is "beyond the pale of fair and just collection techniques" and that the State should be limited to refusing to register a motor vehicle when the purchase and use tax is not paid, the court stated,

> The issue is really whether it is easier to find someone to drive one's own car if one cannot drive, or to obtain a registered automobile for one's own use if one can drive but has no other car. Seen in this light, we cannot conclude that suspension of driving privileges is any more harsh or coercive than refusal to register a motor vehicle . . . .

Id. at 862. We agree and conclude that the plaintiff's right to register his motor vehicle does not rise to the level of a fundamental constitutional right, nor does it implicate the fundamental right to travel. Since no fundamental right is involved, the applicable standard for mea-

suring the constitutionality of Vermont's statute is the "rational basis" test.

As stated earlier, under the "rational basis" test we may find a statute unconstitutional "only where the relevant law classifies similar persons for different treatment upon wholly arbitrary and capricious grounds." ***Hadwen, Inc. v. Department of Taxes, supra,*** 139 Vt. at 42, 422 A. 2d at 258. Any classification of taxation is permissible which "rationally furthers a legitimate state purpose." *Zobel v. Williams, supra,* 457 U.S. at 60; see ***Hadwen v. Department of Taxes, supra,*** 139 Vt. at 42, 422 A.2d at 259. Since the purpose of the purchase and use tax is to pay for the maintenance and improvement of the state and interstate highway systems, 32 V.S.A. § 8901, the tax bears an obviously reasonable relationship to the services provided, namely, the privilege of using those highways.

The Legislature has chosen to grant certain exemptions from the purchase and use tax, see 32 V.S.A. § 8911 (1)-(13); all non-exempt persons must pay the four percent tax. Among the legislative exemptions—and the only one pertinent hereto—is one for residents who pay a sales or use tax elsewhere on pleasure cars acquired outside Vermont, providing the state or province collecting the tax "would grant the same pro-rata credit for Vermont tax paid under similar circumstances." *Id.* § 8911(9).

We note that the Vermont motor vehicle purchase and use tax does not apply to most nonresidents. Those nonresidents who come into the state to purchase a vehicle and then leave immediately to return to their home states do not have to pay a purchase or use tax to Vermont. See *id.* § 8903(a) (purchase tax is payable "by a resident"). Those who must pay either a purchase tax or the compensating use tax include residents who purchase in Vermont, *id.* § 8903(a); residents who register cars purchased outside Vermont in a state or province that would grant no pro-rata credit for any Vermont purchase or use tax paid by one of its residents, *id.* § 8903(b); persons such as plaintiff who move into Vermont and then register cars acquired before they became residents of the state, see *id.* § 8903(a), (b); persons who accept employment or engage in a trade, profession or occupation in Vermont for a period of at least six months and purchase a car here or operate one for more than 30 days, *id.* §§ 8902(2), 8903(a), (b), 23 V.S.A. §§ 4(30), 301; and any foreign partnership, firm, association or corporation doing business in the state and using vehicles in the state in connection with its business, 32 V.S.A. §§8902(2), 8903(a), (b), 23 V.S.A. §§ 4(30), 301.

Thus, Vermont's basic policy is clear: those who use the state's highways must contribute toward their maintenance and improvement. It is also the state's policy to encourage residents to support the local economy by refusing to grant credit for taxes paid to any non-reciprocating state or province. The only exemption under the state's policies is for residents who buy in reciprocal states and cannot avoid paying a sales or use tax to such states. The exemption appears to be based upon a policy of encouraging out-of-staters from reciprocal states to purchase their vehicles in Vermont and pay a sales tax to Vermont, secure in the knowledge that they will not be subject to a duplicate tax in their home states, and upon a legislative assumption that few, if any, tax dollars will be lost through this exercise in comity. Whether the amount of highway tax raised in Vermont in this manner exceeds or falls below the amount lost to other states

through the reciprocal arrangement does not appear of record; nevertheless, the exempt classification is based on a reasonable legislative policy or purpose, and, unless wholly arbitrary, must be upheld. *Allied Stores of Ohio, Inc. v. Bowers, supra,* 358 U.S. at 527; *Hadwen, Inc. v. Department of Taxes, supra,* 139 Vt. at 42, 422 A.2d at 259.

As mentioned, the exemption is not available to residents who acquire cars in states having no reciprocal agreement with Vermont; nor is the exemption available to new residents, such as plaintiff, who, subsequent to acquiring their vehicles, move to Vermont and seek to register them here. A change in the law so as to provide an exemption to either group would run counter to the state's present policies of requiring user contributions and encouraging purchases within the state, and would result in the loss of tax revenues to the state. With respect to new residents, such as plaintiff, who bring their cars with them, they are beyond the reach of any policy of encouragement to purchase in this state, and there is no reason to exempt them from making a fair contribution to the maintenance and improvement of Vermont's highways. Under the present statutory scheme, plaintiff pays the same tax and is treated in exactly the same manner as all non-exempt persons, including the resident who purchases his vehicle in a nonreciprocal state.

It is also necessary to keep in mind that § 8911(9) is an exemption from the payment of taxes, and exemptions are construed strictly, with no claim of exemption to be allowed unless shown to be within the necessary scope of the statute. *Rock of Ages Corp. v. Commissioner of Taxes,* 134 Vt. 356, 359, 360 A.2d 63, 65 (1975). "A state, for

many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere." *Henneford v. Silas Mason Co., supra,* 300 U.S. at 587. The fact that plaintiff does not qualify as a member of the exempt class does not deprive him of the equal protection of the law. *Storaasli v. Minnesota,* 283 U.S. 57, 62 (1931). "[T]he exemption is a proper and lawful one, and [plaintiff] cannot make out a discrimination against him from the mere fact that he is not in a position to claim it." *Id.*

We conclude that the exempt classification established by the Legislature is rationally related to a legitimate purpose of state government, namely, the promotion of commerce within the state and the raising of taxes to help maintain and improve the state and interstate highway system, and that the classification is not an arbitrary one. Accordingly, we find no violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

II.

The Proportional Contribution Clause of the Vermont Constitution has been construed to be the practical equivalent of the Equal Protection Clause. *Pabst v. Commissioner of Taxes,* 136 Vt. 126, 131 n.2, 132-33, 388 A.2d 1181, 1184 (1978); *In re Estate of Eddy,* 135 Vt. 468, 472, 380 A.2d 530, 533-34 (1977). For the same reasons stated in Part I above, we conclude that there has been no violation of the Proportional Contribution Clause.

III.

Plaintiff also contends that 32 V.S.A. § 8909 violates the Privileges and Immunities Clause of Article IV of the

United States Constitution by failing to extend to new residents a credit for sales tax previously paid other States. Before this Court may apply the Clause to § 8909, however, we must first decide "whether the [statute] burdens one of those privileges and immunities protected by the Clause." *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden,* 52 U.S. L. W. 4187, 4190 (U.S. February 21, 1984) (No. 81-2110) (citing *Baldwin v. Montana Fish and Game Commission,* 436 U.S. 371, 383 (1978)). "Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, alike." *Baldwin v. Montana Fish and Game Commission, supra,* 436 U.S. at 383. Thus the Privileges and Immunities Clause will not come into play unless a basic or fundamental right is involved.

Plaintiff argues that his right to travel is infringed by the requirement that he pay a use tax to register his vehicle, without being granted the same exemption or credit afforded to state residents. As we have previously noted, the right to travel, although a fundamental right, *Shapiro v. Thompson, supra,* 394 U.S. at 630, is not involved herein. Accordingly, the Privileges and Immunities Clause of the United States Constitution does not come into play and there has been no violation of that constitutional clause.

IV.

Finally, plaintiff invokes the Commerce Clause in support of his cause, contending that Vermont's purchase and use tax discriminates against interstate commerce by

failing to provide equal treatment for out-of-state purchases.

In order for the Commerce Clause to apply, the transaction at issue must be one that comes within the scope of interstate commerce. Because "interstate commerce" is a term of such wide implications and ramifications the courts have carefully avoided any attempt to give it a comprehensive definition. *Gross Income Tax Div. v. J. L. Cox & Son,* 227 Ind. 468, 475, 86 N.E.2d 693, 696 (1949).

Generally speaking, the indispensable element in interstate commerce is the importation of people or goods, even one's own goods, into one state from another. *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 255-56 (1964); *United States v. Hill,* 248 U.S. 420, 423-24 (1919). Whether the movement is commercial in nature is immaterial. *Heart of Atlanta Motel, Inc. v. United States, supra,* 379 U.S. at 256. It has long been settled that when personal property has been brought into a state and come to a permanent rest, or merely halted for a moment before resuming its interstate journey, taxes upon the privilege of use, storage or consumption within the state do not impose an unconstitutional burden on interstate commerce. *General Trading Co. v. State Tax Commission,* 322 U.S. 335, 338 (1944); *Henneford v. Silas Mason Co., supra,* 300 U.S. at 582-83; *Brown v. Houston,* 114 U.S. 622, 633 (1885). In the words of Justice Cardozo, "A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate." *Henneford v. Silas Mason Co., supra,* 300 U.S. at 583.

There can be no doubt that at all relevant times herein plaintiff and his vehicle had ceased to be in transit. His

intention was to move to Vermont, and at the time he sought to register the vehicle both he and the vehicle had come to rest in Vermont. Plaintiff's station wagon had become "part of the common mass of property within the state of destination," *id.* at 582, and was thus clearly an appropriate subject for the imposition of a non-discriminatory use tax in Vermont. There has been no violation of the Commerce Clause.

Affirmed.

FOR THE COURT:

/s/ Ernest W. Gibson III
Associate Justice

IN THE SUPREME COURT
OF THE
STATE OF VERMONT

Docket No. 83-139

NORMAN WILLIAMS and SUSAN LEVINE

v.

STATE OF VERMONT and
WILLIAM H. CONWAY, JR.
VERMONT COMMISSIONER OF MOTOR VEHICLES

MOTION FOR REARGUMENT

Appellants move under Rule 40, V.R.A.P., to reargue the decision filed in this case on June 15, 1984. This motion is based on the following grounds:

1. This Court erred as a matter of law in holding that the Vermont Motor Vehicle Purchase and Use Tax does not unconstitutionally discriminate against interstate commerce. The Court should reconsider its decision with respect to the Commerce Clause issue in light of *Armco, Inc. v. Hardesty,* 52 U.S.L.W. 4787 (June 12, 1984). *Armco* sets out the proper analysis in determining whether a state tax discriminates against non-residents in violation of the Commerce Clause. This Court's holding that the Commerce Clause does not apply because Appellants' automobiles "had come to rest in Vermont" has been explicitly rejected by the U.S. Supreme Court in *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318, 332, fn. 12 (Commodity is protected " '*even after it has entered the State,* from any burdens imposed by reason of its foreign origin' " (emphasis added)).

2. This Court erred as a matter of law in holding that their "right to travel" was not violated nor even im-

plicated by the Vermont Motor Vehicle Purchase and Use Tax. The right to travel is implicated by *any* legislative scheme which classifies individuals on the basis of state residency or length of residency. *See,* e.g., *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974) (statute providing for free medical care for indigent Arizona residents struck down because non-residents not afforded same treatment). The right to travel is not concerned solely, or even primarily, with "the right to bring property into a state" or "the right to move about freely," as this Court suggests. Rather, it is concerned with resident —non-resident discrimination which effectively penalizes a non-resident for choosing to reside in Vermont.

3. This Court erred as a matter of law in holding that the Vermont Motor Vehicle Purchase and Use Tax does not violate the Privileges and Immunities Clause of the United States Constitution. First, the Privileges and Immunities Clause does not forbid only violations of "fundamental rights" under the Equal Protection Clause, such as the right to travel, as this Court states. *See,* e.g., *Austin v. New Hampshire,* 420 U.S. 656, 660 (differing treatment of residents and non-residents with respect to state income tax struck down as violating "norm of comity"). Second, as stated in paragraph 2 of this motion, the Appellants' rights to travel is in fact implicated and infringed by the Vermont Motor Vehicle Purchase and Use Tax statute.

Dated: Burlington, Vermont
June 27, 1984

THE APPELLANTS

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VERMONT SUPREME COURT

ENTRY ORDER

SUPREME COURT DOCKET NO. 83-139

June Term, 1984

NORMAN WILLIAMS, Esq., and SUSAN LEVINE

v.

STATE OF VERMONT;
WILLIAM H. CONWAY, JR.,
COMMISSIONER OF MOTOR VEHICLES

APPEALED FROM: Washington Superior Court

Docket No. S-436-82Wnc

(Filed July 9, 1984)

In the above entitled cause
the Clerk will enter:

Plaintiffs' motion for reargument is denied.

BY THE COURT:
/s/ Franklin S. Billings, Jr.
Chief Juistice

/s/ William C. Hill

/s/ Wynn Underwood

/s/ Louis P. Peck

/s/ Ernest W. Gibson III
Associate Justices

[PA 249]

No. 84-592

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORMAN WILLIAMS AND SUSAN LEVINE,
Appellants,

v.

STATE OF VERMONT AND
WILLIAM H. CONWAY, JR., COMMISSIONER,
VERMONT DEPARTMENT OF MOTOR VEHICLES,
Appellees.

On Appeal from the Supreme Court of Vermont

APPELLEES' BRIEF

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QUESTIONS PRESENTED

1. Whether the Vermont motor vehicle purchase and use tax (Vt. Stat. Ann. tit. 32, § 8901 *et seq.*) violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by its failure to afford to a new resident credit for sales tax paid on an automobile purchased, used and registered in a former state of residence.

2. Whether the Vermont motor vehicle purchase and use tax violates the Privileges and Immunities Clause of art. IV, § 2, cl. 1 of the United States Constitution by its failure to afford to a new resident credit for the sales tax paid on an automobile purchased, used and registered in a former state of residence.

3. Whether the Vermont motor vehicle purchase and use tax violates the Commerce Clause (art. I, § 8, cl. 3) of the United States Constitution by its failure to afford to a new resident credit for the sales tax paid on an automobile purchased, used and registered in a former state of residence.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions cited by appellants, the following statutes are involved, the pertinent text of which are reprinted in the Appendix to this Brief:

Vt. Stat. Ann. tit. 23, § 4(30)
Vt. Stat. Ann. tit. 23, § 301
Vt. Stat. Ann. tit. 23, § 411
Vt. Stat. Ann. tit. 23, § 463
Vt. Stat. Ann. tit. 32, § 8905(a)
Vt. Stat. Ann. tit. 32, § 8905(a) (1966) (amended 1975)
Vt. Stat. Ann. tit. 32, § 8912

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APPELLEES' BRIEF

STATEMENT OF THE CASE

Appellee agrees with appellants' Statement of the Case, except as follows:

Appellant—Williams was required to register his motor vehicle in Vermont when he became a resident of this state, not when his Illinois registration expired. *See* Vt. Stat. Ann. tit. 23, §§ 4(30), 301.

The Superior Court did not hold that the Vermont motor vehicle purchase and use tax discriminated on the basis of residency. Rather, it stated:

We are persuaded that 32 V.S.A. § 8911 does not afford, on its face, equal treatment to residents and nonresidents who purchase cars out-of-state. We conclude, however, that this disparity is supported by a rational purpose and is reasonably structured to advance a legitimate legislative goal.

* * * *

While the overall tax burden on the Plaintiffs may be greater than on a state resident who does not move, we are pursuaded that the difference is supported by their use of the highways of more than one state. In any event, the test for an equal protection claim is whether discrimination occurs *within* the state, regardless of whether they were purchased by residents or nonresidents, and Plaintiffs have failed to demonstrate that they would have been treated any differently had they been Vermont residents when they purchased their cars.

J.A. 14-15.

SUMMARY OF ARGUMENT

The Vermont motor vehicle purchase and use tax is a user-based levy to raise revenue for the specific purpose of improving and maintaining this state's highway system. Any person who is required to register a vehicle in Vermont before it may be operated on the highways, *i.e.*, a resident, or any person who simply elects to register it here must pay the tax as a condition precedent to registration.

Vt. Stat. Ann. tit. 32, § 8911(9) confers a pro-rata credit for taxes paid on a pleasure car to another state by a Vermont resident if that state would confer the same credit to its residents who purchase a vehicle in Vermont. This statute was intended to broaden the market in which residents could shop for their automobiles and to encourage the residents of reciprocal states to shop in Vermont. It fosters interstate commerce and serves a legitimate governmental purpose.

The credit is available in Vermont only if the purchaser *first* registers the vehicle here; if it were first registered elsewhere (on other than a temporary or in-transit basis) the owner does not receive credit, irrespective of whether he or she resided in Vermont at the time of purchase. Accordingly, Vermont treats in the same way all who first register a car in this state, and treats in the same way all who had first registered their vehicles elsewhere. The intended and logical beneficiaries of the credit are the former. Appellants, who had purchased, registered and used their vehicles in Illinois and New York before moving to Vermont, fall within the latter class.

The Vermont Supreme Court construed section 8911(9) in *pari materia* with the state's registration laws and found that the credit provision did not distinguish or discriminate on the basis of residency. Ascertaining the legislative intent of the tax and the credit, the court concluded that under the present statutory scheme appellants pay the same tax and are treated in exactly the same manner as all other taxpayers, except for those who are statutorily exempt. *Leverson v. Conway*, 144 Vt. 523, 533, 481 A.2d 1029, 1035 (1984). Hence the court specifically disagreed with appellants' contention that "Vermont residents in exactly the same circumstances . . . would have been granted a credit and would have paid *no* purchase and use tax to Vermont." Appellants' Brief at 7.

Appellants' erroneous and invalidated premise is the foundation upon which all of their constitutional challenges are made. As in *Aero Transit Co. v. Board of Railroad Commissioners of Montana*, 332 U.S. 495 (1947), the Court should

> put aside at the start appellant[s'] suggestion that the Supreme Court of [the state] has misconstrued the state statutes and therefore that [the Court] should consider them, for the purpose of [its] limited function, according to appellant[s'] view of

> their literal import. The rule is too well settled to permit of question that [the] Court not only accepts but is bound by the construction given to state statutes by the state courts.

Id. at 499-500.

Because appellants were not the victims of discrimination by Vermont, their constitutional claims are without merit. They are currently required to pay their fair and equal share for the privilege and services offered by Vermont, and making it a rule of constitutional law requiring the extension of credit would *create* discrimination: As first-time registrants in this state, they would avoid paying for benefits received, at the expense of those who are liable for the purchase tax (residents), and those residents who purchase a car in another state but who wish to use it in Vermont.

Appellants' challenge under the Commerce Clause is equally without merit. Their actions did not constitute interstate commerce. They purchased their automobiles while residents of Illinois and New York, and were obligated to comply with those states' tax and registration laws. They subsequently elected to move to Vermont and to use their cars here, and are likewise obligated to obey this state's tax and registration laws. Appellants were simply involved in two separate *intra*state events and the Commerce Clause is not implicated in this case. Even if the Commerce Clause were implicated, the tax was imposed only after appellants established Vermont residency, and after any interstate commerce had ceased. They were subject to the tax not because they traveled interstate but because they decided to register and use their cars in Vermont.

Nor is there validity in the claim that the Vermont tax scheme is "improperly designed" to encourage in-state purchases. "A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system

of burdens and exemptions without heeding systems elsewhere." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 587 (1937). Any "encouragement" to purchase in Vermont results from appellants' own decisions and from the justifiable failure of their prior states of residence to refund a portion of the sales tax they paid thereto.

Moreover, unlike the tax in *Henneford* which was a general revenue raising device, the excise imposed by Vermont is in the nature of a user fee, the proceeds of which are earmarked for specific highway purposes. Appellants have never contended, and do not contend, that the amount exacted is unreasonable with respect to what is offered by this state, and there is no reason why Vermont should be required to subsidize their move simply because they were required to pay for a privilege elsewhere. To the extent that Vermont must recognize appellants' prior travel decisions it does so by imposing the use tax on the basis of the vehicles' "book value" as of the time Vermont residency is established. Appellants paid no more, or no less than any other similarly situated Vermont taxpayer, and "equality for the purpose of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 70 (1963).

ARGUMENT

I. THE VERMONT TAX SCHEME IS A VALID EXERCISE OF THE STATE'S POWER TO REQUIRE CONTRIBUTION FOR SUPPORT OF ITS HIGHWAY SYSTEM.

Sales and use taxes are different in concept, and are assessed upon different transactions:

> A sales tax is a tax upon the freedom to purchase . . . . A use tax is on the enjoyment of that which was purchased . . . . Though sales and use taxes may secure the same revenues and serve the same complementary purposes, they are . . . taxes on different transactions and for different opportunities afforded by a State.

McLeod v. J. E. Dilworth Co., 322 U.S. 327, 330-31 (1944).

The Vermont legislature has declared, Vt. Stat. Ann. tit. 32, § 8901, and the Vermont Supreme Court has found that "the purpose of the motor vehicle purchase and use tax is to pay for improvement and maintenance of the state and interstate highway systems." *Leverson v. Conway*, 144 Vt. 523, 527, 481 A.2d 1029, 1032 (1984). In addition to raising revenue for highway purposes, the use tax is designed "to protect a state's revenues by taking away the advantages to residents of traveling out of state to make untaxed purchases, and to protect local merchants from out of state competition which, because of its lower or nonexistent tax burdens, can offer lower prices." *Rowe-Genereux, Inc. v. Department of Taxes*, 138 Vt. 130, 133-34, 411 A.2d 1345, 1347 (1980).

A state has the power to require its motoring public to contribute to the support of its highway facilities. *Kane v. New Jersey*, 242 U.S. 160 (1916); *Wells v. Malloy*, 402 F. Supp. 856 (D. Vt. 1975), *affirmed without opinion*, 538 F.2d 317 (2d Cir. 1976). The incidence

of this tax is upon those who are most likely to be heavy users of Vermont's highways and facilities—those who register their vehicles in Vermont. Thus, "Vermont's basic policy is clear: Those who use the state's highways must contribute toward their maintenance and improvement." *Leverson*, 144 Vt. at 532, 481 A.2d at 1034.

Appellants contend that Vermont is constitutionally compelled to extend to them the credit provided by Vt. Stat. Ann. tit. 32, § 8911(9), which provides, that the tax shall not apply to

> pleasure cars acquired outside the state by a resident of Vermont on which a state sales or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another state is less than the Vermont tax the tax due shall be the difference.

Unless the classification is wholly arbitrary, the legislature certainly has the authority to grant exemptions from a tax. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959). The obvious objective of the section 8911(9) credit is to encourage interstate commerce. Residents desiring to purchase a pleasure car for first use in Vermont may shop in the several reciprocal states without having to consider the tax consequences. (Likewise, residents of reciprocal states can shop in Vermont assured that credit will be afforded in the home state if a tax is paid here.) Having already purchased, registered, and used their cars in other states at the time they became Vermont residents, however, there is no rational reason for extending the credit to appellants. As the court stated:

> With respect to new residents, such as [appellants] who bring their cars with them they are beyond the reach of any policy of encouragement to purchase in this state and there is no reason to exempt them

from making a fair contribution to the maintenance and improvement of Vermont's highways.

Leverson, 144 Vt. at 533, 481 A.2d at 1035.

In view of the purpose of the tax and the purpose of the section 8911(9) credit, appellants' liability should properly be compared to that of any other Vermont resident who purchases the identical car in Vermont at the same time they became residents. As an excise for the privilege of using a car in Vermont and for availing themselves of Vermont's services and facilities, no greater tax was exacted from appellants than would have been from similarly situated, long-standing Vermont residents.

II. THE VERMONT MOTOR VEHICLE PURCHASE AND USE TAX ACT DOES NOT, ON ITS FACE OR AS APPLIED, DISCRIMINATE AGAINST A NEW RESIDENT IN FAVOR OF A LONG-STANDING RESIDENT, AND DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A. Liability for the tax is triggered by registration of the vehicle in Vermont.

The Vermont Supreme Court held that it was the act of "registration, and not the move to Vermont [which] triggered the use tax obligation." *Leverson*, 144 Vt. at 530, 481 A.2d at 1033. The tax is collected from the user "with the registration application . . . at the time of first registering or transferring a registration to such motor vehicle as a condition precedent to registration thereof." Vt. Stat. Ann. tit. 32, § 8905(b). All residents are obligated to register their vehicles if they desire to use them in this state, Vt. Stat. Ann. tit. 23, § 301, and regardless of where the owner may reside, the registration of a motor vehicle in Vermont is "conclusive evidence that the purchase and use tax applies." Vt. Stat. Ann. tit. 32, § 8903(c). Hence, liability for this tax does not arise until registration is sought. In appellants' case, liability for the tax arose six months after they accepted employ-

ment here, or otherwise became Vermont residents. Vt. Stat. Ann. tit. 32, § 8902(2). Prior to that time, appellants had the privilege of free and unlimited use of their automobiles in this state by virtue of their then current registration in Illinois and New York. Vt. Stat. Ann. tit. 23, § 411.

Section 8911(9) does not on its face discriminate on the basis of how long a person has been a resident of Vermont. Thus, the cases relied upon by appellants are readily distinguishable. *Shapiro v. Thompson*, 394 U.S. 618 (1969), and *Dunn v. Blumstein*, 409 U.S. 330 (1972), involved durational requirements that impermissibly discriminated against new residents. Similarly, in *Zobel v. Williams*, 457 U.S. 55 (1982), the amount of the benefit was directly related to how long the person had been a resident of the state. In contrast, the section 8911(9) credit is available to any person who, after establishing Vermont residency, purchases an automobile in a reciprocal state but who first registers it here. It should be emphasized that only a "resident" need register his or her car in Vermont: A person who previously had no contact with this state but who decides to register the vehicle here will, by the act of registration, be considered a resident for the purpose of the use tax.

In view of the purpose of the tax and the credit, there is no reason why Vermont should extend credit to a person who moves to the state with an automobile which had already been purchased, registered and used elsewhere. Appellants' conclusion that there is discrimination based on "residency" stems from their failure to understand the purpose and actual administration of section 8911(9).

B. The Vermont legislature did not intend to afford credit under section 8911(9) for tax paid on an automobile which had first been registered in another state.

Section 8911(9) grants a credit of the sales tax paid to a "reciprocal" state when a Vermont resident who

registers the automobile in this state pays the use tax imposed by section 8903(b). A state is "reciprocal" under section 8911(9) if it would extend credit to its own residents for any sales tax or use tax paid to Vermont.

Illinois and New York are reciprocal states. Accordingly, if a Vermont resident were to purchase a car in either of those states without registering it there, he or she would receive a pro-rata credit when the vehicle is registered in Vermont. Likewise, a resident of Illinois or New York who becomes liable for the Vermont use tax would receive credit in his or her respective home state when registration is sought therein. N.Y. Tax Law § 1118(7)(a) (McKinney 1975); Ill. Ann. Stat. ch. 120, § 439.3(d) (Smith-Hurd 1984). However, because nonresidents are exempt from the sales tax, Vt. Stat. Ann. tit. 32, §§ 8902(2), 8903(a), a resident of Illinois or New York who purchases a car in Vermont is liable for the full use tax in his or her state. Similarly, because a Vermont resident is exempt from the Illinois and New York tax, *see* N.Y. Tax Law § 1117(a)(1) (McKinney 1975); Ill. Ann. Stat. ch. 120 § 439.3(h) (Smith-Hurd 1984), he or she is liable for the full use tax in Vermont.[1]

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[1] It has been observed that "all states appear to provide that an out-of-state purchaser of an automobile may avoid the payment of a sales tax in the state of purchase by using a temporary license plate which will be valid long enough for him to return to his home state." *J.C. Penney Co. v. Hardesty*, 264 S.E.2d 604, 613 (W. Va. 1980). *See, e.g.*, Vt. Stat. Ann. tit. 23, § 463. As a practical matter, it would thus appear that the current availability of the § 8911(9) credit is more a matter of form than substance, for even if the vehicle were purchased in a reciprocal state, the Vermonter would still be liable for Vermont's 4% use tax. The impact of § 8911(9) would obviously be greater if reciprocal states were to amend their laws to include the taxation of purchases by nonresidents. Hence, this statute is designed to encourage interstate commerce now and in the future.

The instant litigation stems from the repeal in 1979 of Vt. Stat. Ann. tit. 32, § 8911(6), which exempted from the motor vehicles purchase and use tax,

> pleasure cars, the owners of which were not residents of his state at the time of purchase and had registered and used the vehicle for at least thirty days in a state or province other than Vermont.

See 1979 Vt. Acts No. 202 (Adj. Sess.) § 3, Pt. VI, eff. Sept. 1, 1980 (repealing § 8911(6)).

Prior to the repeal of section 8911(6) a nonresident who had registered and used his car for less than thirty days in another state was required to pay the full use tax; credit was not afforded by Vermont for sales tax paid to the motorist's former state of residence. Charged with the responsibility of administering the tax, Vt. Stat. Ann. tit. 32, § 8901, appellee has interpreted the repeal of section 8911(6) as further evidence of legislative intent that all "new" residents, i.e., all persons who transfer their registration from another state to Vermont—regardless of how long they may have used a car in another state—are required to pay the tax without the offsetting credit. As the Vermont Supreme Court noted, the repeal of section 8911(6) is consistent with the State's basic policy that those who use its highways must contribute toward their maintenance and improvement.

It was logical for the legislature to presume when it enacted section 8911(9) that a person who purchases a car in a state other than his own is likely to return shortly thereafter and to use it primarily in the home state. Similarly, it was logical for the legislature to presume that when a resident registers his car in another state he or she has manifested an intent to use the car there and to be subject to its jurisdiction. It should be emphasized that a person may—depending upon the par-

ticular state's definition of "residency"—be considered a resident of several states for the same purpose. The phrase "resident of Vermont" in section 8911(9) was simply intended to limit the credit to those who first register and use their cars in Vermont. As the Vermont Supreme Court recognized, section 8911(9) must be read in *pari materia* with Vt. Stat. Ann. tit. 32, § 8901 (the purpose of the tax), Vt. Stat. Ann. tit. 23, §§ 4(30), 301 (residency defined), and Vt. Stat. Ann. tit. 32, §§ 8902 (2), 8903(a), (b) (those who are liable for the tax). That phrase simply distinguishes first-time registrants from those individuals, like appellants, who become residents and who thereater register a vehicle which previously had been registered and used in another state. Indeed, the State of Vermont denies the credit to even the oldest of its residents if he or she had registered the vehicle on a permanent basis in any other state.[2]

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[2] Contrary to their claim, Appellants' Brief at 12, n.15, the appellee has asserted through all the proceedings that individuals in appellants' position would have been required to pay the Vermont motor vehicle purchase and use tax even if they were residents of Vermont when they acquired their cars out-of-state. *See, e.g.*, Appellees' Brief at 18 (Vermont Supreme Court) ("If the car were 'permanently' registered in the state where it was purchased, the Vermonter would not receive credit under 32 V.S.A. § 8911(9) for the sales tax when he or she subsequently sought to register it in this State.") Indeed, the Vermont Superior Court held that "the state exacts a use tax upon the value of all cars used *within* the state, regardless of whether they were purchased by residents or nonresidents, and plaintiffs have failed to demonstrate that they would have been treated any differently had they been Vermont residents when they purchased their cars." J.A. 15.

Appellants also quote the Vermont Supreme Court out of context. *See* Appellants' Brief at 12, n.15. The court held that it was the act of registration and not the move to Vermont which triggers the use tax obligation, and that "under the present statutory scheme, plaintiff pays the same tax and is treated in exactly the same manner as all non-exempt persons, including the resident who purchases his vehicle in a nonreciprocal state." 144 Vt. at 533, 481 A.2d at 1035.

[3] Vermont does not currently tax nonresidents on the purchase of automobiles. Vt. Stat. Ann. tit. 32, § 8903(a). It can, of course, repeal that exemption when it pleases. The decision to forego this source of revenue is not unreasonable, and is certainly within the

It is for the legislature to determine the most appropriate means, given the state's particular needs, of financing governmental services. While appellants' prior states of residence may be generous with those who elect to move to, and reside there (or perhaps those who simply desire to register their vehicles there) by affording credit for taxes paid elsewhere, *see* N.Y. Tax Law § 1118(7)(a) (McKinney 1975); Ill. Ann. Stat. ch. 120, § 439.3(d) (Smith-Hurd 1984), plainly that was not the intent of the Vermont legislature when it enacted section 8911(9). Illinois, New York, and Vermont have not agreed to surrender to each other or to any other state the tax revenue generated from purchases by its own residents.

In short, appellants cannot make out a discrimination against them by Vermont from the mere fact that they are not in a position to claim the credit. *See Storaasli v. Minnesota*, 283 U.S. 57 (1931).

C. Having purchased and registered their automobiles in their respective home states while residents thereof, appellants are not similarly situated with the intended beneficiaries of section 8911(9).

The legislature has broad authority in defining those classes of individuals, transactions, and types of property that should be exempt from a particular tax. *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). A state which taxes nonresidents on the purchase of an automobile can retain that revenue. Had the Vermont legislature decided to impose a sales tax on automobiles purchased by nonresidents, this state could certainly retain the proceeds.[3]

It should be emphasized that by not registering the vehicle in the state of purchase the Vermont resident has only obtained the privilege of using the vehicle in Vermont. If the vehicle were registered where it was purchased, the owner, like appellants, would acquire the right to use it there for an indefinite period (assuming all subsequent annual fees were paid), and upon registering it in Vermont would also acquire the right to use it for an indefinite period here.

When appellants registered their cars they were treated as though they had just purchased them in Vermont. The use tax was based upon the (low) book value of a car of the same make, model and year. Vt. Stat. Ann. tit. 32, § 8907. They paid the same amount that Vermont would exact from any other resident who purchases the identical car at that time. Appellants are similarly situated with, and are treated in the same way as the long-standing resident who purchases a car out-of-state and who first registers it there. They are not similarly situated with the intended beneficiaries of section 8911(9)—those who purchase a car out-of-state but who first register it in Vermont.

D. Residents would be discriminated against if Vermont were required to afford credit for taxes paid by appellants to their former states of residence.

The State of Vermont received no compensation from appellants, Illinois, or New York when appellants, as residents of Illinois and New York, purchased and registered their cars. When appellants resided in Illinois and New York, they availed themselves of the highway facilities

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province of the legislature. *See, e.g., Olsen v. Nebraska*, 313 U.S. 236, 246 (1941). As individuals who had already purchased, used, and registered the cars in their home states before they moved to Vermont, appellants are obviously beyond the reach of any policy of encouragement either to purchase the vehicle here or in any other state, and certainly, cannot complain about the nonresident exemption from the purchase tax.

and services offered, and there was sufficient contact to establish a tax nexus. Obviously, with respect to that revenue the State of Vermont had the same legal claim or interest as that of any other state—none.

In *Kane v. New Jersey*, 242 U.S. 160 (1916), a nonresident challenged a New Jersey statute which made it an offense to operate a vehicle in that State unless it had first been registered therein. The Court stated:

> The power of a State to regulate the use of motor vehicles on its highways has been recently considered by this Court and broadly sustained. It extends to nonresidents as well as to residents. It includes the right to exact reasonable compensation for special facilities afforded as well as reasonable provsions to ensure safety.
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> * * * *
>
> [The law] contain[s] a reciprocal provision by which nonresidents whose cars are duly registered in their home State are given, for a limited period, free use of the highways in return for similar privileges granted to residents of [the other State]. Such a provision promotes the convenience of owners and prevents the relative hardship of having to pay the full registration fee for a brief use of the highways. It has become common in state legislation; . . . But it is not an essential of valid regulation. Absence of it does not involve discrimination against nonresidents, for any resident similarly situated would be subjected to the same imposition. A resident desiring to use the highways only a single day would also have to pay the full annual fee.

Id. at 167-68. *See also Hendrick v. Maryland*, 235 U.S. 610 (1915) (rejecting the contention that a similar statute discriminates against residents of the District of Columbia, attempts to regulate interstate commerce, violates the right to travel and denies equal protection).

Similarly, in *Storaasli v. Minnesota*, 283 U.S. 57 (1931), a soldier residing on a federal base in Minnesota

challenged a Minnesota statute which did not exempt him from a highway "privilege tax," although nonresidents were exempt if their vehicles had been duly registered in their home states. Rejecting an equal protection challenge and a claim that plaintiff had not been accorded a privilege extended to other nonresidents, the Court stated:

> We think it plain that the levy is an excise for the privilege of using the highways. . . . Residents of other States who desire to use the highways for more than the period specified in certain sections extending the privilege, must register their vehicles and pay the same tax as residents of Minnesota. . . . Viewed as imposing a privilege tax, the statute is alleged to discriminate against appellant in favor of residents, because it exempts vehicles licensed under it from payment of property taxes. But the exemption is a proper and lawful one, and appellant cannot make out a discrimination against him from the mere fact that he is not in a position to claim it. Doubtless in the case of every taxing act which creates exemptions there are those who cannot bring themselves within the exempt class, but this does not deprive them of the equal protection of the law.

Id. at 62.

Because they desired to use their cars in Illinois and New York, appellants were obligated to pay the sales tax and permanently register the cars. They were required to pay the tax even though they may have known at that time that they would be relocating. *See International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 345 (1944). They subsequently chose to move, to become Vermont residents, and to use their cars in this State. By registering the cars in Illinois and New York appellants obtained only the privilege of use (for an indefinite period) in *those* states. That they may have used them briefly is of no moment: "One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may." *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U.S. 285, 289 (1935).

The State of Vermont should not be required to extend credit for any purchase or use tax appellants paid to their prior states of residence for the privilege exercised there. *Cf. Genex/London, Inc. v. Kentucky Board of Tax Appeals*, 622 S.W.2d 499, 503 (Ky. 1981) (the Equal Protection Clause is not violated by "the denial of a credit for sales tax paid to a sister state against use tax levied on equipment first purchased and used outside Kentucky . . . when the statute grants a credit for sales tax paid to a sister state against use tax levied on equipment purchased outside Kentucky and first used in Kentucky.") To grant it would be patently unfair to earlier residents who, in effect, would be charged with the duty of subsidizing appellants' use of Vermont facilities. To be sure, if credit were extended it would result in appellants escaping all tax liability to this state.[4]

Appellants are not entitled to preferential treatment simply because they exercised the right to establish Vermont residency. *See Shapiro v. Thompson*, 394 U.S. 618 (1969); *Shaffer v. Carter*, 252 U.S. 37, 59 (1919). By virtue of the requirement that a resident pay to Vermont the difference between any tax collected by a reciprocal state and the Vermont use tax, the long-standing resident pays no less for the privilege of using the car in Vermont than does the new resident who brings along a car. It is the amount exacted for the privilege of using *Vermont* facilities—not how much an individual may have paid to a prior state of residence or the number of states in which the motorist is deemed a resident—that is in issue.

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[4] Appellant-Williams, for example, paid a sales tax of $465 to Illinois when he purchased his automobile for $9,300 in 1980. When he registered the car in Vermont its low book value was $4,300, and he paid a use tax of $172. J.A. 5-6.

As stated in *Henneford v. Silas Mason Co.*, 300 U.S. 577, 587 (1937):

> We have not meant to imply . . . that allowance of credit for other taxes paid to Washington made it mandatory that there should be a like allowance for taxes paid to other states. *A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere.* . . . A taxing act is not invalid because its exemptions are more generous than the state would have been free to make them by exerting the full measure of her power. (Emphasis added.)

III. THE VERMONT MOTOR VEHICLE PURCHASE AND USE TAX DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE UNITED STATES CONSTITUTION.

A. Appellants were not treated differently than other persons required to pay the Vermont motor vehicle purchase and use tax. Any disparity in treatment results from actions by and within the States of Illinois and New York.

A newcomer has the unlimited privilege to use his car in Vermont, free of charge, until he either declares himself a resident, or is deemed a resident by virtue of his conduct in this state. Once residency is established the tax liability to Vermont is the same as that of any other resident, irrespective of how long the person was a resident, who at that time purchases the identical car in Vermont or in any other state.

In *Brown v. Houston*, 114 U.S. 622 (1884), a Pennsylvania resident challenged the imposition of a tax by Louisiana on coal shipped there, but which had already been taxed by Pennsylvania. The Court recognized that the Louisiana tax was not imposed by reason of the coal being brought into that state but because it had arrived at its destination and had come to its place of rest. *Id.* at 632. Rejecting a challenge under the Privileges and Immunities Clause, the Court stated:

> We are certainly unable to see how, or in what respect, any equality of privileges as citizens has been denied to the plaintiffs by the imposition of the tax. Their property was only taxed like that of all other persons, whether citizens of Louisiana or of any other state or country. Not the slightest discrimination was made.

Id. at 635.

As in *Brown*, any "disparity" results not from the denial by Vermont of a privilege or immunity but from the fact that each state "is to be reckoned as a self-contained unit, which may frame its own system of burdens and exceptions without heeding systems elsewhere." *Henneford*, 300 U.S. at 587. To accept Appellants' reasoning and to extend credit for the Illinois and New York sales tax would be to hold Vermont captive to the mercy of the Illinois and New York legislatures; it would deny to Vermont *its* authority as a sovereign state. The Privileges and Immunities Clause was designed "to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 344 U.S. 385, 395 (1948). It was not designed to deprive a state of its fundamental power to assert jurisdiction over the people therein, or to force one state to finance the travel decisions made by the residents of another.

B. The right to register a motor vehicle does not rise to a level protected by the Privileges and Immunities Clause.

The Privileges and Immunities Clause has been interpreted so that "only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the state treat all citizens, resident and nonresident, alike." *Baldwin v. Fish & Game Commission of Montana*, 436 U.S. 371 (1978).

Appellants err in their contention that the interest in issue is the "right to travel." Rather, the interest in issue is simply the right to register a motor vehicle. *See Wells v. Malloy*, 402 F.Supp. 856 (D. Vt. 1975) (right to drive is not fundamental; suspension of driver's license, and refusal to register a motor vehicle are valid tax collection strategies), *affirmed without opinion*, 538 F.2d 317 (2d Cir. 1976).

In *Baldwin*, the court upheld the authority of Montana to charge a nonresident a greater fee than a resident for an elk hunting license. It stated:

> [Elk hunting] is not a means to the nonresident's livelihood. The mastery of the animal and the trophy are the ends that are sought; appellants are not totally excluded from these. The elk supply, which has been entrusted to the care of the State by the people of Montana, is finite and must be carefully tended in order to be preserved.
>
> Appellant's interest in sharing this limited resource on more equal terms with Montana residents simply does not fall within the purview of the Privileges and Immunities Clause. Equality in access to Montana elk is not basic to the maintenance or well being of the Union. Appellants do not—and cannot—contend that they are deprived of a means of a livelihood by the system or of access to any part of the state to which elk may seek to travel.

436 U.S. at 388.

Vermont's interest in maintaining and improving its highways is certainly no less important. As in *Baldwin*, appellants have not been denied "access to any part of the State to which [they] may seek to travel," and there is nothing in the pleadings establishing that these particular automobiles are an indispensable means to their livelihood.[5]

[5] Vt. Stat. Ann. tit. 32, § 8909 provides that "[i]f the tax due under subsections (a) and (b) of section 8903 of this title is not paid *as hereinbefore provided* the commissioner shall suspend such purchaser's right to operate a motor vehicle within the State of Vermont . . ." (Emphasis added.) Contrary to the legal allegation in their complaint, *see* J.A. 8, the sanction of license suspension is currently applicable if the resident uses a vehicle in Vermont which has not been registered but *should* be registered. Payment of the tax is keyed to registration. *See* Vt. Stat. Ann. tit. 32, § 8905. If a resident does not in fact use the vehicle in Vermont he or she would not be required to register it here, Vt. Stat. Ann. tit. 23, § 301, and would not have to pay the tax. *Compare* Vt. Stat. Ann. tit. 32, § 8905(a) *with* Vt. Stat. Ann. tit. 32, § 8905(a) (1966) (amended 1975). Nothing in the Vermont motor vehicle purchase and use tax precludes the owner from driving any *other* vehicle which has been properly registered.

Accordingly, the cases upon which appellants rely are inapposite. In *Austin v. New Hampshire*, 420 U.S. 656 (1975), the state clearly treated its residents more favorably than nonresidents: The former were exempt from income tax, but the latter were taxed on their income earned in New Hampshire. In *Travis v. Yale & Towne Manufacturing Co.*, 252 U.S. 60 (1920), both nonresidents and New York residents were taxed on their New York income, but the residents were permitted a "personal" deduction which decreased their tax liability.

The state is not constitutionally compelled to expend its limited resources on the construction and maintenance of highways. While appellants may have the right to own automobiles they have but a privilege of using them on the facilities constructed at taxpayer expense. The tax in this case seeks only to raise revenue to facilitate the exercise of that privilege by appellants and others. Any "disparity of treatment" results from the legal reality that as residents of Illinois and New York who desired to purchase and use their cars in those states, appellants were obligated to pay the respective sales tax.

The imposition of the Vermont motor vehicle use tax in these circumstances did not affect appellants' fundamental right to travel, and did not constitute the denial

of a privilege or immunity. If appellants have any complaint it should be addressed to the Illinois and New York legislatures, for if anything, it was the tax and registration laws of those states that affected their facileness of egress (but certainly not in any manner or degree proscribed by the Constitution). In any event, it is clear that the Vermont tax did not affect their right of ingress to this state. "Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual states, and are permitted." *Baldwin*, 436 U.S. at 383.

IV. THE VERMONT MOTOR VEHICLE PURCHASE AND USE TAX DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

A. The Vermont motor vehicle and use tax is neither designed to, nor does it improperly encourage in-state motor vehicle purchases.

Appellants concede that Vermont may charge users of its roads for maintenance and improvement costs and, indeed, can exact contributions by imposing a fee based on the value of the vehicle. Appellants' Brief at 29. At no time have appellants contended that the tax actually charged by Vermont is unreasonable with respect to the services or privilege provided by this State. They contend that the tax scheme somehow "provides an illegal incentive for those planning to move to Vermont to wait and purchase their motor vehicles there." Appellants' Brief at 28.

Appellants' argument disregards the fact that as former residents of Illinois and New York who *wanted* to use their automobiles in those states, they were obligated to register the cars and to pay the respective tax. Moreover, their argument ignores the purpose of the credit—to broaden the market available to *Vermont* residents by enabling them to shop in other states.

Vermont does not require an individual's presence in the state in order to register a motor vehicle. Thus, if appellants had so chosen they could have first registered their cars with Vermont after purchasing them in Illinois and New York. The difficulty, however, is that when they made their purchases they were legal residents of those states and were obligated to so register the cars if they wanted to use them. Ill. Ann. Stat. ch. 95 ½, § 3-402 (Smith-Hurd 1971); N.Y. Vehicle and Traffic Law 62A, § 401 (McKinney 1970). Thus, appellants are victims of nothing more than their own purchase and travel decisions, and the laws of their home states. *Cf. Moorman Manufacturing Co. v. Bair*, 437 U.S. 267, 277 n. 12 (1978) (no Commerce Clause violation when the alleged disparity was the consequence of the combined effect of Iowa and Illinois statutes; Iowa could not be responsible for the latter). Appellants were not the victims of any "coercive" Vermont statute.

Creating a new rule of constitutional law requiring a state to afford credit for an excise paid elsewhere would effectively result in discrimination against those residents who are liable for its sales tax, for they would be the only ones who pay for the support of the facilities enjoyed by everyone else. The consequences are evident: The states that impose a sales tax on nonresidents will get richer at the expense of the taxpayers of the state where the vehicle is actually used.

Requiring appellants to pay their fair share to Vermont can hardly be considered constitutionally proscribed "economic protectionism". Indeed, in *J.C. Penney Co. v. Hardesty*, 264 S.E.2d 604 (W. Va. 1980) the taxpayer alleged a violation of the Commerce Clause due to West Virginia's refusal to afford credit for sales tax paid on an automobile which had been purchased in New Jersey while a resident of the latter. The court stated that "this taxing scheme is neither designed to coerce West Virginia residents into purchasing automobiles in the

State of West Virginia in preference to foreign states nor does it have that effect." 264 S.E.2d at 613. Similarly, Vermont's tax scheme had no influence on appellants' decision to use their vehicles in Illinois and New York, and in no way penalized them for their decision to move to this state.

B. The Commerce Clause is not implicated.

In *J.C. Penney Co.*, a case presenting similar facts, the court stated:

> The appellee asserts that it is unfair to tax her for the entire value of her car after the State of New Jersey has levied a similar tax, but she confuses unfairness with unconstitutionality. There is no question that this duplication of tax may be, indeed, unfair but it is not unconstitutional under the Commerce Clause because the appellee is not involved in interstate commerce. She was a resident of the State of New Jersey and was taxed as such while now she is a resident of West Virginia and is taxed as such. Since appellee is not, herself, engaged in interstate commerce in her capacity as driver of a motor vehicle, *Complete Auto's* requirement of fair apportionment does not apply to her. . . . [T]here is no Commerce Clause violation because there is no interstate commerce. When appellee drove her car into West Virginia she did nothing commercial, she merely traveled.

264 S.E.2d at 613-14.

Appellants did nothing of a commercial nature. They purchased and used their cars as residents of Illinois and New York, and later decided to establish Vermont residency and to submit to this state's laws. Appellants were simply involved in two separate *intra*state events, one in Vermont, and one in their prior home states. Accordingly, the Commerce Clause is not implicated by appellants' actions.

C. Even if the Commerce Clause were implicated, the tax was imposed by Vermont in a nondiscriminatory manner and only after commerce had ceased.

Although "no state can . . . impose upon the products of other states, brought therein for . . . use . . . more onerous public burdens or taxes than it imposes upon the like products of its own territory," *Guy v. Baltimore*, 100 U.S. 434, 449 (1879), it is well settled that interstate commerce must bear its fair share of the local tax burden. *See, e.g., McGoldrick v. Berwind-White Co.*, 309 U.S. 33 (1940). Accordingly, the Court has long recognized that the Commerce Clause does not prevent a state from imposing a nondiscriminatory tax on the possession of property, *Federal Compress & Warehouse Co. v. McLean*, 291 U.S. 17 (1934), or on the use of property, *Henneford*, even though it may subsequently enter interstate commerce. Similarly, articles that have been transported interstate and which have come to rest are no longer held to be within that stream of commerce, and can be subjected to a nondiscriminatory use tax, *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64 (1963), or property tax. *Brown v. Houston*, 114 U.S. 622 (1885).

The State of Vermont is not constitutionally compelled to allow appellants to use their automobiles for six months before it could demand payment of the tax, for any resident is required to pay the tax and to register the vehicle here before it could be used in this state. Vt. Stat. Ann. tit. 23, § 301. *See Storaasli*; *Kane*. Appellants became liable for the tax only after they established residency. As the court stated:

> There can be no doubt that at all relevant times herein [appellants] and [their] vehicle[s] had ceased to be in transit. [Their] intention was to move to Vermont, and at the time [they] sought to register the vehicle both [they] and the vehicle[s] had come to rest in Vermont. [Appellants' vehicles] had become 'part of the common mass of property within

> the state of destination,' [*Henneford v. Silas Mason Co.*, 300 U.S.] at 582, and was thus clearly an appropriate subject for the imposition of a nondiscriminatory use tax in Vermont. There has been no violation of the Commerce Clause.

Leverson, 144 Vt. at 535-36, 481 A.2d at 1036.

D. The Vermont tax is a user fee and need not be apportioned.

Relying upon cases that concern income, privilege, and gross receipt taxes, appellants contend that the Vermont motor vehicle tax needs to be "apportioned," [6] and that it violates the Commerce Clause because it fails to consider the amount of actual use in Vermont. As demonstrated below, there is no basis in law for that argument.

In *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), the Court upheld a compensating use tax noting that everyone, regardless of where the article may have been purchased, received credit for sales tax paid thereon. It emphasized, however, that the decision was "not meant to imply . . . that allowance of a credit for other taxes paid . . . made it mandatory that there should be a like allowance for taxes paid to other states". 300 U.S. at 577.

Unlike the Vermont motor vehicle purchase and use tax, which is user-based and the proceeds of which are earmarked for specific highway purposes, the tax in *Henneford* was a general revenue raising device. Subsequent decisions by the Court have recognized the importance of such a distinction. As the Court has stated, a "user" fee

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[6] In the proceedings below the only challenge under the Commerce Clause was on the basis that the Vermont tax scheme creates an illegal incentive to purchase a car in this state. *See* Appellants' Brief at 32-36 (Vermont Supreme Court). At no time below have appellants raised the issue that the use tax needs to be "apportioned". Nor have appellants at any time below raised the issue that the propriety of the tax should be determined by the amount of actual use.

or "tax" "although termed a tax, cannot be tested by standards which generally determine the validity of taxes." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622 n.12 (1981) (quoting *Interstate Transit Inc. v. Lindsey*, 283 U.S. 183, 190 (1931)). User taxes are valid so long as they "(1) do not discriminate against interstate commerce, (2) are based upon some fair approximation of use, and (3) are not shown to be excessive in relation to the cost to the government of the benefits conferred." *Massachusetts v. United States*, 435 U.S. 444, 464 (1977) (citing *Evansville-Vandenburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707, 716-720 (1972).

In *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950), a common carrier challenged a Maryland use tax which was based upon two percent of the fair market value of the motor vehicle. It was argued that a tax on vehicle value should be forbidden by the Commerce Clause because it varies for each carrier without relation to actual road use. The Court upheld the tax noting that it "should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted." *Id.* at 545. It stated:

> Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use. These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with 'rough approximation rather than precision' . . . . Each additional factor adds to administrative burdens of enforcement which fall alike on taxpayers and government. We have recognized that such burdens may be sufficient to justify states in ignoring even such a key factor as mileage, although the result may be a tax which on its face appears to bear with unequal weight upon different carriers. . . . Upon this type of reasoning rests our general rule that taxes like that of Maryland here are valid un-

less the amount is shown to be in excess of fair compensation for the privilege of using state roads."

Id. at 546-47 (Citations and footnotes omitted.)

Similarly, in *Massachusetts v. United States, supra,* the Court stated:

> Our decisions implementing these constitutional provisions have consistently recognized that the interests protected by these Clauses are not offended by revenue measures that operate only to compensate a government for benefits supplied. *See e.g., Clyde Mallory Lines v. Alabama,* 296 U.S. 261 (1935) (flat fee charged each vessel entering port upheld because charge operated to defray cost of harbor policing); *Evansville-Vandenburgh Airport Authority v. Delta Airlines, Inc.,* [*supra*]. . . . A governmental body has an obvious interest in making those who specifically benefit from its services pay the cost and, provided that the charge is structured to compensate the government for the benefit conferred, there can be no danger of the kind of interference with constitutionally valued activity that the Clauses were designed to prohibit.

435 U.S. at 462-63.

And, in *Evansville-Vandenburgh Airport Authority,* rejecting a claim that the Commerce Clause, Equal Protection Clause, and right to travel were violated by a $1 tax on enplaning commercial air passengers, the Court stated:

> We therefore regard it as settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike. The principle that burdens on the right to travel are constitutional only if shown to be necessary to promote a compelling state interest has no application in this context. *See Shapiro v. Thompson,* 394 U.S. 618 (1969). The facility provided at public expense aids rather than hinders the right to travel. A permissible charge to help defray the cost of the facility is therefore not a burden in the constitutional sense.

Id. at 714.

* * *

> [T]here is no suggestion that the Indiana and New Hampshire charges do not in fact advance the constitutionally permissible objective of having interstate commerce bear a fair share of the costs to the States of airports constructed and maintained for the purpose of aiding interstate air travel. In that circumstance, '[a]t least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State[s].'

Id. at 722 (Citations omitted.)

After becoming residents, appellants decided to continue to avail themselves of the services and facilities offered by Vermont, by registering their automobiles and paying the tax. The fee they paid "is for the privilege of a use as extensive as [they] will that it shall be." *Aero Mayflower Transit Co. v. Georgia Public Service Commission,* 295 U.S. 285, 289 (1935). Neither appellant has alleged or ever claimed that the amount paid (appellant-Williams, $172; appellant-Levine, $110) exceeds fair compensation for what is provided by this state. Indeed, the Vermont Supreme Court stated:

> Since the purpose of the purchase and use tax is to pay for the maintenance and improvement of the state and interstate highway systems, 32 V.S.A. § 8901, the tax bears an obviously reasonable relationship to the services provided, namely, the privilege of using those highways.

Leverson, 144 Vt. at 531, 481 A.2d at 1034.

"[I]t is clearly within the discretion of the state to determine whether the compensation for the use of its

highways by automobiles shall be determined by way of a fee, payable annually or semi-annually . . . or otherwise." *Kane v. New Jersey*, 242 U.S. 160, 168 (1916). A one-time fee based upon the fair market value of the vehicle is reasonable compensation for the temporally unlimited privilege provided by Vermont. *See Capitol Greyhound Lines.* It should be emphasized that all the proceeds of the tax "are paid into and accounted for in the transportation fund." Vt. Stat. Ann. tit. 32, § 8912.[7]

Accordingly, the cases upon which appellants rely are inapposite; they do not concern user fees or taxes. As a user fee, the Vermont tax does not discriminate against interstate commerce, it is based upon a fair approximation of use, and certainly, it is not excessive in relation to the cost of the benefits and privileges conferred. *See Evansville-Vandenburgh Airport Authority*; *Kane.* There is, simply stated, no reason or requirement for a tax such as Vermont's to be "apportioned." [8]

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[7] For the fiscal year ending June 30, 1983, $15,753,588 was received from the motor vehicle purchase and use tax, [1983] Vt. Comm'r Finance Ann. Rep. 52; *see* Vt. Stat. Ann. tit. 32, § 182, $48,299,211 was appropriated for highway engineering and construction, 1981 Vt. Acts No. 248 (Adj. Sess.), § 277, and $30,007,514 was appropriated for highway maintenance. *Id.* § 278.

[8] The Vermont motor vehicle use tax is based upon the (low) book value of the vehicle as of the date it is registered in the state, Vt. Stat. Ann. tit. 32, § 8907, rather than its original cost. To the extent that the Commerce Clause requires a user tax to reflect the prior use of an automobile in another state, the method selected by the Vermont legislature is certainly reasonable. *See Atlantic Gulf & Pacific Co. v. Gerosa*, 16 N.Y.2d 1, 6, 209 N.E.2d 86, 88, 261 N.Y.S.2d 32, 36 (1965) (use tax based upon the value of the item when first used in the state does not violate the Commerce or Equal Protection Clauses), *appeal dismissed*, 382 U.S. 368 (1966); *Fontenot v. S.E.W. Oil Corp.*, 232 La. 1011, 95 So.2d 638, 640 (1957) (construing a use tax so that the item is valued at the time it is used in the state, in order to prevent an unjust, unreasonable, and absurd result).

CONCLUSION

Appellants' constitutional claims, "made seemingly attractive by high-sounding suggestions of inequality and unfairness," *Austin v. New Hampshire*, 420 U.S. 656, 670 (Blackmun, J., dissenting), are constructed upon the erroneous foundation that they have been the victims of discrimination by Vermont. Appellants have ignored the purpose of the tax and the credit, as well as the fundamental principle that this is a Nation of 50 sovereign states. By their actions they were subject to the jurisdiction of both Vermont and their home states, and there is no constitutional merit in their belief that having complied with the laws of one state they acquire immunity from the laws of another. To hold otherwise is to confer preferential treatment and to create discrimination.

Accordingly, the decision of the Vermont Supreme Court should be affirmed.

Respectfully submitted,

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February 22, 1985

APPENDIX

APPENDIX

VERMONT STATUTES

Vt. Stat. Ann. tit. 23, § 4(30):

> "Resident" shall include all legal residents of this state and in addition thereto, any person who accepts employment or engages in a trade, profession or occupation in this state for a period of at least six months. Also in addition thereto, any foreign partnership, firm, association or corporation having a place of business in this state shall be deemed to be a resident as to all vehicles owned or leased and which are garaged or maintained in this state.

Vt. Stat. Ann. tit. 23, § 301:

> Residents as defined in section 4 of this title, except as provided in section 301a of this title, shall annually register motor vehicles owned or leased for a period of more than thirty days and operated by them, unless currently registered in Vermont. A person shall not operate a motor vehicle nor draw a trailer or semi-trailer on any highway unless such vehicle is registered as provided in this chapter.

Vt. Stat. Ann. tit. 23, § 411:

> As determined by the commissioner of motor vehicles, a motor vehicle owned by a nonresident, shall be considered as registered and a nonresident operator shall be considered as licensed in this state, if the nonresident owner or operator has complied with the laws of the foreign county or state of his residence relative to the registration of motor vehicles and the granting of operators' licenses. Any exemptions provided in this section shall, however, be operative as to an owner or operator of a motor

vehicle only to the extent that under the laws of the foreign country or state of his residence like exemptions and privileges are granted to operators duly licensed and to owners of motor vehicles duly registered under the laws of this state. . . .

Vt. Stat. Ann. tit. 23, § 463:

[A]n in-transit registration permit for the purpose of movement over the highways of certain motor vehicles otherwise required to be registered when such vehicles are sold in state or province . . . shall be valid for the period of ten days from the date of issue.

Vt. Stat. Ann. tit. 32, § 8905(a):

Every purchaser of a motor vehicle subject to a tax subsection (a) of section 8903 of this title shall forward such tax form to the commissioner, together with the amount of tax due at the time of first registering or transferring a registration to such motor vehicle as a condition precedent to registration thereof.

Vt. Stat. Ann. tit. 32, § 8905(a) (1966) (amended 1975):

Every purchaser of a motor vehicle subject to a tax under subsection (a) of section 8903 of this title shall forward such tax form to the commissioner, together with the amount of tax due within 30 days of the time of first registering or transferring a registration to such motor vehicle.

Vt. Stat. Ann. tit. 32, § 8912:

The taxes collected under this chapter shall be paid into and accounted for in the transfortation fund.

NEW YORK STATUTES

N.Y. Tax Law § 1117(a)(1) (McKinney 1975):

Receipts from any sales of a motor vehicle shall not be subject to the retail sales tax imposed under subdivision (a) of section eleven hundred five, despite the taking of physical possession by the purchaser within the state, provided that the purchaser, at the time of taking delivery: (1) is a nonresident of this state.

N.Y. Tax Law § 1118(7)(a) (McKinney 1975):

The following users of property shall not be subject to the compensating use tax imposed under this article: In respect to the use of property . . . to the extent that a retail sales or use tax was legally due and paid thereon, without any right to a refund or credit thereof, to any other state or jurisdiction within any other state but only when it is shown that such other state or jurisdiction allows a corresponding exemption with respect to the sale or use of tangible personal property . . . upon which such a sales tax or compensating use tax was paid to this state.

ILLINOIS STATUTES

Ill. Ann. Stat. ch. 120, § 439.3 (Smith-Hurd 1984):

To prevent actual or likely multistate taxation, the tax herein imposed does not aply to the use of tangible personal property in this State under the following circumstances:

* * * *

(d) the use, in this State, of tangible personal property which is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another State in respect to

the sale, purchase or use of such property, to the extent of the amount of such tax properly due and paid in such other State;

* * * *

(h) the use, in this State, of a motor vehicle which was sold in this State to a nonresident, even though said motor vehicle is delivered to said nonresident in this State, if said motor vehicle is not to be titled in this State, and if a driveaway decal permit is issued to said motor vehicle as provided in section 3-603 of the Illinois Vehicle Code. The issuance of the driveaway decal permit shall be prima facie evidence that said motor vehicle will not be titled in this State.

(5)

No. 84-592

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NORMAN WILLIAMS and SUSAN LEVINE,
Appellants,

v.

STATE OF VERMONT and WILLIAM H. CONWAY, JR., COMMISSIONER, VERMONT DEPARTMENT OF MOTOR VEHICLES,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF VERMONT

APPELLANTS' REPLY BRIEF

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Introduction

Appellees' Brief presents a welter of confused policies, principles, and logic. This reply attempts to sort out appellees' arguments while pointing out their flaws. Parts I and II will address the Fourteenth Amendment issues raised by the appeal; Part III will concern the Commerce Clause.

I. APPELLEES' INTERPRETATION OF VERMONT'S MOTOR VEHICLE PURCHASE AND USE TAX CANNOT BE SQUARED WITH THE RECORD AND IS INSUFFICIENT TO SAVE THE STATUTE IN ANY CASE.

Appellants believe the simple premise of their Fourteenth Amendment claim in this case bears repeating: individuals (like appellants) who move to Vermont are forced to pay a four percent tax on their automobiles and are not granted credit for similar (or

higher) taxes already paid in other states. In contrast, Vermont residents who (like appellants) purchase their cars in another state are granted a credit for taxes paid the other state. The simple, undeniable fact is that Vermont discriminates against nonresidents with respect to this tax in order to increase state revenues. The simple, undeniable law is that state revenues cannot be increased at the expense of the fundamental constitutional rights of individuals. Sosna v. Iowa, 419 U.S. 393 at 406 (1975).

Appellees attempt, as it were, to pull the rug from appellants' Fourteenth Amendment argument by denying its premise. They contend that Vermont residents who (like appellants) purchase and register automobiles in other

states also are not entitled to a tax credit.[1] Their contention: 1) contradicts the face of the statute itself; 2) is not supported by any judicial interpretation; and 3) is insufficient to save the statute in any event.

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1. They also suggest that, since other states frequently allow nonresidents to purchase automobiles without paying sales tax, provided such automobiles are removed within two or three weeks, most Vermont residents purchasing automobiles in other states pay a full four percent motor vehicle tax to Vermont in any event. There is nothing whatever in the record to support this assertion. Even if it were true, it would have little bearing on this case, since "the constitutionality of one State's statutes affecting nonresidents [cannot] depend upon the present configuration of statutes of another State." Austin v. New Hampshire, 420 U.S. 656 at 668 (1975).

A. The Vermont Motor Vehicle Tax Must Be Interpreted In Accordance With Its Express Terms.

There is, first of all, nothing whatever in the statute to even suggest that Vermont residents who register cars in other states are not entitled to a tax credit when they seek to register their cars in Vermont.[2]

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2. Appellees seemed to recognize this difficulty in their brief to the Vermont Supreme Court when they said: "Read in a vacuum §8911(9) could be interpreted as granting a tax credit to a Vermonter who permanently registers the car in another state." Appellees' Brief dated July 19, 1983, at 19, note 2 (Vermont Supreme Court). Elsewhere, appellees have suggested that their unique view is contained in an interpretation which has "not been formally promulgated," Appellee's Reply to Petition for Rehearing at 2, note 1, in Leverson v. Conway, No. 84-315 (1984), even though Vermont law requires such interpretations to be published, commented upon, and formally filed
(Footnote Continued)

Rather, Vt. Stat. Ann. tit. 32, §8911 provides:

> The tax imposed by this chapter shall not apply to:
> . . .
> (9) pleasure cars acquired outside the state by a resident of Vermont on which a state sales or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another state is less than the Vermont tax the tax due shall be the difference.

Nor do appellees supply any support whatever for their bald statement that the "Vermont legislature did not intend to afford credit under section 8911(9) for tax paid on an automobile which had first been registered in another

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(Footnote Continued)
before they can become effective. See Vt. Stat. Ann. tit. 3, §§836 et seq. (Administrative Procedure Act).

state." Appellees' Brief at 9. Appellees' argument that the repeal of Vt. Stat. Ann. tit. 32, §8911(6) is "further evidence" of such an intent on the part of the legislature, Appellees' Brief at 11, strains credulity. As noted in Appellants' Brief (at 11, note 14), former section 8911(6) exempted nonresidents who had registered and used automobiles in other states from the Vermont motor vehicle tax. It is impossible to see how repeal of that exemption could possibly suggest that residents who registered cars in other states were not entitled to the credit available to them under section 8911(9).

Appellants respectfully suggest that appellees' unfounded interpretation of section 8911(9) is a post-hoc

attempt to salvage a law which is beyond repair. Appellants believe this Court should do exactly what the Court did in Keyishian v. Board of Regents of New York, 385 U.S. 589 (1967), when confronted with the argument that, although a statute was unconstitutional on its face, appellees did not administer it in accordance with its terms: the Court should reject the argument out-of-hand. Id. at 599.

B. Appellees' Interpretation Of The Motor Vehicle Tax Statutes Cannot Be Squared With The Opinion Of The Vermont Supreme Court.

Appellees' argument that the Vermont Supreme Court so interpreted the statute is equally ill-taken. Indeed, that court explicitly found in Leverson v. Conway, 144 Vt. 523, 527

481 A.2d 1029 (1984), J.A. 22-23, that residents "who purchase cars outside the state and pay a sales or use tax to another state are exempt from paying a use tax to the State of Vermont," whereas "a nonresident who moves to Vermont and desires to register his motor vehicle here must pay the State of Vermont a use tax of four percent." That is exactly what appellants contend.

There is simply no suggestion in the Vermont Supreme Court's opinion that a Vermont resident who purchased and registered his car outside of Vermont would not be entitled to a credit under Vt. Stat. Ann. tit. 32, §8911(9), as appellees seem to believe. See Appellees' Brief at 2-4. The Vermont court's statement that the tax

is triggered by registration in the state, discussed on page 8 of Appellees' Brief, refers to the timing of the tax-- it in no way suggests that Vermont residents who registered automobiles in other states would not be granted a tax credit. The fact remains, as discussed in appellants' first brief, that the decision to reside in Vermont, because it leads to the necessity of registering one's car, which in turn leads to the necessity of paying a four percent tax on that car, results in a tax which is not imposed on Vermont residents. That result cannot be justified under the Fourteenth Amendment.

C. Appellees' Interpretation Of The Motor Vehicle Tax Would Not Save The Statute Under The Fourteenth Amendment.

Finally-- and this is the larger point-- even if the Vermont legislature altered the law to coincide with appellees' view, appellees would take very little from it. A statutory scheme which granted a credit with respect to taxes paid on cars purchased in other states but not with respect to cars purchased and registered in other states would still discriminate impermissibly against nonresidents. It is not difficult to see that very few Vermont residents who purchase and pay sales taxes on automobiles in other states actually register their cars in such states. Accordingly, out-of-state automobile registration would be merely a proxy for nonresidence and could not

be used as the basis for imposing a tax, any more than an ordinance forbidding wooden laundries could be used to discourage Chinese businessmen, Yick Wo v. Hopkins, 118 U.S. 356 (1885), or literacy tests to stop black voters, Guinn v. United States, 238 U.S. 347 (1915).

In sum, no one has ever doubted that the Equal Protection Clause applies to classifications which are ostensibly neutral but are obvious pretexts for discrimination. See Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 at 272 (1979), and cases there cited. Appellants believe what Justice Frankfurter said about the Fifteenth Amendment applies with equal force to the Fourteenth: "The Amendment

nullifies sophisticated as well as simpleminded modes of discrimination." Lane v. Wilson, 307 U.S. 268, 275 (1939).[3]

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3. In this connection, Judge Wisdom observed in United States v. City of Jackson, Mississippi, 318 F.2d 1, 5 (5th Cir. 1963) (footnotes omitted):

> This disingenuous quibble must rest on the assumption that federal judges are more naive than ordinary men. But in the sector of the law encompassed in the subject 'Civil Rights,' case by case federal courts have acquired a thorough education in 'Sophisticated Circumvention.'

Appellants believe little more than an elementary course is required to see through appellees' argument.

II. THE ASSERTED PURPOSE OF VERMONT'S MOTOR VEHICLE PURCHASE AND USE TAX DOES NOT JUSTIFY THE DISCRIMINATION AGAINST APPELLANTS.

The Vermont Supreme Court stated that the tax credit provided by Vt. Stat. Ann. tit. 32, §8911(9), was designed to encourage out-of-staters "to purchase their vehicles in Vermont and pay a sales tax to Vermont." Leverson, 144 Vt. at 532, 421 A.2d 1029, J.A. at 29. Appellees, conversely, insist that the "obvious objective" of section 8911(9) is to allow Vermont residents to purchase cars in other states. Appellees' Brief at 7.

However that may be, both of these purported justifications are irrelevant to the instant case. The question here is whether Vermont may extend a tax credit to residents which it does not

extend to nonresidents, not whether it may grant residents a credit for taxes paid other states-- for this it surely may do. In other words, the issue of whether Vermont may encourage local business (according to the Vermont Supreme Court) or interstate commerce (according to appellees) by means of a tax credit has nothing to do with whether Vermont may discriminate against nonresidents in its taxing laws. To date, the only convincing rationale put forward for this tax discrimination is the need to raise revenue, and that is patently insufficient. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

The cases on which appellees rely to justify Vermont's motor vehicle purchase and use tax scheme are

unavailing. Both Kane v. New Jersey, 242 U.S. 160 (1916), and Hendrick v. Maryland, 235 U.S. 610 (1915), discussed at page 15 of Appellees' Brief, upheld state statutes under the Equal Protection Clause which required residents and nonresidents to pay small but identical fees for the use of state highways. Kane ruled that the statute involved did not discriminate against nonresidents since they were required to pay no more than residents in the same position. Such equal payment plainly does not exist in the instant case, since appellants have been forced to pay Vermont a four percent tax in a situation where residents would pay nothing. In Hendrick, the Maryland statute actually provided for reciprocity with respect to

nonresidents registered in their home state, which is notably absent here. [4]

Storaasli v. Minnesota, 283 U.S. 57 (1937), discussed at pages 15-16 of Appellees' Brief, is also inapposite. Just as in Kane, Storaasli involved a state statute imposing highway user fees on residents and nonresidents alike. The Storaasli court upheld the fee against the plaintiff, a soldier on a Minnesota army base, since he would be forced under it to pay no more than similarly-situated state residents. As

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4. Aside from the fact that their holdings do not support appellees' position, Kane and Hendrick, because of their age, are of doubtful authority in the face of the modern equal protection analysis applied in Shapiro v. Thompson, 394 U.S. 618 (1966), and related cases. Appellees' discussion of the Shapiro line of cases is conspicuous by its absence.

discussed above, equal payment is simply not the case here.

III. THE VERMONT MOTOR VEHICLE PURCHASE AND USE TAX IS NOT FAIRLY APPORTIONED AS THE COMMERCE CLAUSE REQUIRES.

Appellees' insistence that, under Vt. Stat. Ann. tit. 32, §8911(9), the four percent Vermont motor vehicle tax applies to every car previously registered in another state lends additional force to appellants' Commerce Clause claim. It is plain that such a tax, if imposed by every state, would substantially affect the automobile purchasing plans of all those moving from one state to another. For example, an individual in Oregon planning to move to Maine would be unlikely to purchase a new car for the journey, since, by doing so, he would subject himself to

tax in both states. From a tax standpoint, his most intelligent course would lie in selling his car in Oregon, moving to Maine, and buying a new car there, even though such a course might have nothing to do with his legitimate needs. This result cannot be harmonized with Container Corp. of America v. Franchise Tax Board, 103 S.Ct. 2933 (1983), or Armco, Inc. v. Hardesty, 52 U.S.L.W. 4787 (1984).

Appellees seem to believe that their mere designation of Vermont's tax as a "user fee" serves as a talisman to ward off any and all Commerce Clause challenges. See Appellees' Brief at 26-30. In fact, this Court has held repeatedly that a user fee must be apportioned fairly, like any other levy, to pass muster under the Commerce

Clause. See, e.g., McCarroll v. Dixie Greyhound Lines, 309 U.S. 176, 181 (1940) (levy must be "measured by or [have] some fair relationship to the use of the highways for which the charge is made"); Interstate Transit v. Lindsey, 283 U.S. 183, 185 (1931) (tax on motor busses must be "a fair contribution to the cost of constructing and maintaining [public highways] and of regulating the traffic thereon"); Sprout v. South Bend, 277 U.S. 163, 169-170 (1928).

Despite appellees' contention that "[a] one-time fee based upon the fair market value of the vehicle is reasonable compensation for the temporally unlimited privilege provided by

Vermont," Appellees' Brief at 30,[5] a less fair method of apportioning the "fee" could scarcely be devised. The fairest approach would consider type of vehicle, tonnage, and mileage for a specified period. A less fair method (though still superior to Vermont's) would impose a flat fee for a month, or even annually, perhaps still taking into account the vehicle's weight. A one-time percentage tax, such as Vermont's, however, based on the value

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5. The case cited for this proposition, Capital Greyhound Lines v. Brice, 339 U.S. 542 (1950), does not support it, since the tax there was imposed in connection with a mileage adjustment. Moreover, appellants question whether Capital Greyhound would be decided the same way today, in view of Justice Frankfurter's strong and well-reasoned dissent. See id. at 548.

of the motor vehicle alone, bears almost no relationship to the likely value of future highway use. Indeed, a similar flat tax on busses, ostensibly for the maintenance of city streets, was struck down by the Court in Sprout since, as it said, "A flat tax substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways." 277 U.S. at 170 (Brandeis, J.).

Conclusion

This reply has tried to sort out the tangled skein of arguments in

Appellees' Brief. First, appellees' attempt to trivialize appellants' Fourteenth Amendment claims should be rejected out-of-hand by this Court. Appellees' novel interpretation of Vt. Stat. Ann. tit. 32, §8911(9) is at odds with the language of the statute itself; is unsupported by any judicial interpretation; and, in any event, is inadequate to save the Vermont motor vehicle tax from invalidation. Second, appellees' asserted justification for the tax (which contradicts that of the Vermont Supreme Court) is wholly irrelevant to the discriminatory classification challenged by this appeal. Finally, appellees' interpretation of Vt. Stat. Ann. tit. 32, §8911 does add urgency to appellants' Commerce Clause claim,

since, under that interpretation, anyone purchasing and registering a car in another state will be subject to double taxation-- and the attendant pressure to alter their purchasing decisions accordingly-- if they choose to register their car in Vermont. Appellees' simple designation of the tax as a "user fee" does not save it from this basic violation of the Commerce Clause.

For all of these reasons, the Vermont Motor Vehicle Purchase and Use Tax scheme should be stricken by this Court and amounts paid by appellants

under it refunded.

Respectfully submitted,

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